IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 729.

HARRY THEIS, WYLLYS K. BLISS and W. L. HAGER, Not Individually But as the Bondholders' Protective Committee in the Matter of Certain Bonds of Grand River Drainage District of Livingston and Linn Counties, Missouri, the Original Petitioner, and EVERT G. CULLING, GLENN B. SCHAFFNER and B. F. BARNHART, the (Proposed) Interveners,
Petitioners,

against

DURWARD BELMONT LUTHER, Alleged Bankrupt,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and Associate Justices of the United States:

Harry Theis, Wyllys K. Bliss and W. L. Hager, not individually but as the Bondholders' Protective Committee in the matter of certain bonds of Grand River Drainage District of Livingston and Linn Counties, Missouri, the original petitioner, and Evert G. Culling, Glenn B. Schaffner and B. F. Barnhart, the (proposed) interveners, in the above-entitled case, respectfully pray the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review an opinion and

judgment of the Circuit Court of Appeals for the Eighth Circuit rendered herein on October 29, 1945 (R. pp. 221, 226), which affirmed an order entered by the United States District Court for the Western Division of the Western District of Missouri on April 21, 1945 (R. 184), confirming an order (R. 59) of the Referee, dated October 4, 1944, dismissing the second amended petition of the original petitioner for the adjudication of respondent, Durward Belmont Luther, as a bankrupt (R. 30), and an order (R. 160) of the Referee, dated December 4, 1944, sustaining the respondent's motions (R. 80, 82) to strike (1) the original petitioner's motion for a new trial (R. 60); (2) a joint motion (R. 63) of the original petitioner and interveners, Culling and Schaffner, and (3) a joint motion (R. 73) of the original petitioner and intervener, Barnhart, to vacate said order of dismissal and to grant said interveners leave to intervene and join in the original petition for adjudication.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case is reported in 151 Fed. (2d), at page 397, and appears on pages 221 to 226 of the transcript of the record filed herewith.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Bondholders' Protective Committee on July 27, 1944, as the sole petitioning creditor, with claims aggregating $60,862.45, instituted an involuntary proceeding, alleging that the creditors of respondent were less than 12 in number (R. 30, 31). Respondent was the petitioner's field agent to develop sales for lands acquired by it in Grand River Drainage District through foreclosure sales of the drainage tax liens securing the bonds held by it, with authority to develop sales and recommend to it,

based upon his knowledge of the highest and best prices available, as to acceptance or rejection by it of offers to purchase such lands resulting from his efforts (R. 31). The respondent, in his answer (R. 42) scheduled his assets at $278,500.00, listed 22 unsecured creditors (R. 49) and moved for dismissal on the ground that his creditors were more than 12 in number. 16 of these creditors held small claims for current accounts (R. 49, 53). The 16 claims aggregate $340.02 or .0056 of the petitioner's claims. None of these claims exceed $45.00 in amount; 13 are for less than $30.00 and 6 are for less than $12.00 each. As to nature, 4 are for groceries and meat, 7 are for repairs and service, 2 are for medical bills and drugs, 1 is for clothing, 1 is for jewelry and the other is for balance due on a mule. The claims of 11 of the 16 creditors last mentioned aggregate but $161.33 (the largest of which is $28.69), or .0027 of the petitioner's claims. If the above 16 small-current-account creditors, or even the last mentioned 11 of them, are not counted, then his creditors are less than 12 in number. The petitioner contended that these small-current-account creditors should not be counted under the Bankruptcy Act as amended by the Chandler Act of 1938. The Referee gave notice (R. 53) of the pendency of the proceeding and of a hearing, to the listed creditors. At the hearing no additional creditors appeared and joined in the petition. The Referee held (R. 52) that these small-current-account creditors should be counted in computing the total number of creditors and on October 4, 1944, ordered the proceeding dismissed (R. 59).

The claims of the three interveners, Barnhart, Culling and Schaffner (land purchasers), are each quasi-contractual for money had and received (Ex. A, R. 66; Ex. B, R. 69; Ex. A, R. 76).

The gravamen of each claim is that the respondent was fraudulent to the intervener in extracting money from

him for a non-existent contract (R. 66, 69, 76). Affidavits filed by the interveners in support of their claims show that the respondent was furnished by his principal with forms (used in each transaction) of sale contracts. The Committee took title to the lands as it acquired them in the name of its field agent, and the Committee, when and if it executed any such contract, agreed to have its field agent convey the land sold by quit-claim deed, subject to the other terms of the sale contract (R. pp. 91, 115, 139). The deeds recited as the consideration therefor the "sum of one dollar" (R. pp. 107, 131), or "the sum of one dollar and other valuable considerations" (R. 151).

These forms of sale contracts expressly provided that, although the instrument was to be first signed by the intervener, the proposed sale contract would not become binding upon the Committee until personally signed by the Committee (R. pp. 97, 121, 143).

In the transaction with each intervener the respondent extracted from him a sum of money in excess of the sale price fixed by the Committee, by presenting to the intervener a false sale contract which included such excess sum as part of the Committee's purported sale price. This false sale contract was produced by respondent connecting together different parts of two several genuine instruments, i. e., the respondent withdrew page 2 (which recited the smaller sum as the sale price) from the genuine instrument signed by the Committee, and produced the false sale contract by connecting together with the remaining pages of the instrument signed by the Committee, page 2 (which contained the larger sum as the sale price) previously withdrawn by him from the genuine instrument which had been signed by the intervener (R. pp. 85-105, incl.; 111-129, incl.; 135-149, incl.). This excess sum the respondent pocketed and still holds.

In each transaction the money pocketed by respondent was from the cash down payment, as follows:

In Culling's transaction page 2 of the genuine instrument signed by him recited the sale consideration at $1485.00, of which $495 was the down payment and $990 was deferred in notes (R. p. 117). Page 2 of the instrument signed by the Committee recited the sale consideration at $990.00, all deferred in notes (R. p. 125). Culling's claim is for the $495.00 down payment pocketed by respondent (R. 66).

In Schaffner's transaction page 2 of the genuine instrument signed by him recited the sale consideration at $940.00, of which $550.00 was the down payment and $390.00 was deferred in notes (R. p. 93). Page 2 of the instrument signed by the Committee recited the sale consideration at $470.00, of which $80.00 was the down payment and $390.00 deferred in notes (R. p. 101). Schaffner's claim is for the $470.00 of the $550.00 down payment pocketed by respondent (R. p. 69).

In Barnhart's transaction page 2 of the genuine instrument signed by him recited the sale consideration at $840, all cash (R. p. 141). Page 2 of the instrument signed by the Committee recited the sale consideration at $400.00 (R. p. 147). Barnhart's claim is for the $440.00 pocketed by respondent (R. p. 76).

The respondent did not include the interveners in his list of creditors filed with his answer (R. 49). They received no notice of the pendency of the proceeding and had no opportunity to be heard (R. 157). Within 10 days after the entry of the order of dismissal, to wit: on October 13, 1944, the original petitioner filed its motion for a new trial (R. 60) under rule 59 of the Rules of Civil Procedure, alleging that since the dismissal it had discovered that interveners Culling and Schaffner were creditors of the bankrupt; that the respondent had not listed them as creditors, that they had received no notice of the pendency of the proceeding, that they desired to intervene and join in the petition for adjudication and

that the respondent's failure to list interveners wrongfully deprived the petitioner of its substantial right to negotiate with and solicit interveners to intervene and join in the original petition. Also, on October 13, 1944, interveners Culling and Schaffner filed their joint motion (R. 63), in which the original petitioner joined, alleging that they were creditors of the respondent for money had and received; that they had not been listed and had received no notice of the pendency of the proceeding or opportunity to be heard and praying that the order of dismissal be vacated and that leave be granted to them to file their intervening petitions (R. 66 and 69), which were presented with the joint motion. On October 26, 1944, a similar motion (R. 73) was filed by intervener Barnhart (in which the original petitioner joined) to which his intervening petition (R. 76) was attached. The respondent filed motion (R. 80) to strike the motion for new trial, and motion (R. 82) to strike the joint motions (R. 63, 73). Upon a hearing the Referee ruled (R. 160) that the interveners were not creditors of the respondent and he denied petitioners' motions and sustained the respondent's motions to strike.

The Referee ruled the issue solely upon the pleadings and the supporting affidavits (R. 59, 161). No testimony was heard by him.

The District Court with memorandum opinion not reported, but which appears on page 179 et seq. of the record, affirmed both orders of the Referee (R. 184).

If small-claim-current-account creditors are not to be counted in computing the total number of creditors, or if interveners are creditors, the proceeding should not have been dismissed.

BASES OF JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 24, c, of the Bankruptcy Act (11 U. S. C. A., Sec. 47, c), and Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A., Sec. 347 (a).

The opinion and judgment of the Circuit Court of Appeals herein were filed on October 29, 1945 (R. 222). The petitioners filed their petition for rehearing on November 13, 1945 (R. 227), which petition was denied on December 5, 1945 (R. 261). On December 14, 1945, the Circuit Court of Appeals stayed the mandate for thirty days, pending petitioners' Application for Writ of Certiorari (R. 261).

QUESTIONS PRESENTED.

First: In determining whether the bankrupt's creditors are less than 12 in number, where a sole petitioner has instituted a proceeding under Sec. 59 (b) [11 U. S. C. A., Sec. 95 (b)] of the Bankruptcy Act, are creditors having small claims for current accounts to be counted?

(a) In holding that such creditors are to be counted does not the decision of the Court of Appeals seriously impair, if not destroy, the right of a sole petitioner under Sec. 59 (b) to maintain an involuntary proceeding in bankruptcy?

(b) Does not such decision enable the holders of small-current-account claims, with little at stake, to prevent bankruptcy administration of a debtor's estate, and thereby to defeat the interest of a substantial creditor contrary to the spirit of the Chandler Act?

(c) Are not the challenged current-account-claims too small for the law's protection?

(d) Are not the claims of small-current-account credi-

tors secured claims, for all intents and purposes of the Bankruptcy Act, and therefore expressly excluded under Sec. 59 (e) (4)?

(e) Is not the holding of the Court of Appeals that the express exclusions in Sec. 59 (e) prevents the exclusion of small-current-account creditors not so expressly excluded, in conflict on the same matter with the decisions of the First Circuit Court of Appeals in Myron M. Navison Shoe Co. v. Lane Shoe Co. (C. C. A. 1st, 1929), 36 Fed. (2d) 454, 457, and in Leighton v. Kennedy (C. C. A. 1st, 1904), 129 Fed. 737, 739, and of the Tenth Circuit Court of Appeals in International Shoe Co. v. Smith-Cole, Inc. (C. C. A. 10th, 1933), 62 Fed. (2d) 972, 974?

(f) Is not the decision of the Court of Appeals that unsubstantial claims are cognizable in the count of creditors in conflict with the decision of the First Circuit Court of Appeals on the same matter in Leighton v. Kennedy (1st C. C. A., 1904), 129 F. 737, 740?

Second. Where the seller's agent retains money which he has obtained through fraud from the purchaser in the sale of land, does the purchaser have a provable claim against the agent under Sec. 63 (a) (4) [11 U. S. C. A., Sec. 103 (a) (4)] of the Bankruptcy Act?

(a) Is not the decision that it is not a fraud upon a third person, and, therefore, not actionable by the third person against the agent, for the agent to accept money from the third person upon the agent's misrepresentation that his principal had signed a contract, in conflict with

(i) applicable local decisions in Carson v. Woods (Mo. Sup., 1915), 177 S. W. 623, 626, and McClure v. H. R. Ennis R. E. and Inv. Co. (1925), 219 Mo. App. 112, 120, 268 S. W. 675, 678, and with applicable general law as set forth in the accompanying brief, as to the unsigned instrument being a contract; and,

(ii) applicable local decisions in McClure v. H. R. Ennis R. E. and Inv. Co. (1925), 219 Mo. App. 112, 120, 268 S. W. 675, 677; Hays v. Smith (Mo. Sup., 1919), 213 S. W. 451, 454, and Hack v. Crain (Mo. Sup., 1915), 177 S. W. 587, 589, and with applicable general law as set forth in the accompanying brief, as to the agent being fraudulent to the third person in accepting money for a non-existent contract.

(b) Is not the decision that the agent's duty to account to his principal, even though not performed, protects the agent against liability for his fraud committed upon the third person, in conflict with applicable local decisions in Hack v. Crain (Mo. Sup., 1915), 177 S. W. 587, 589; Patzman v. Howey, 340 Mo. 11, 22, 100 S. W. (2d) 851, 856, and Tillman v. Bungenstock (1914), 185 Mo. A. 66, 68, 171 S. W. 938, 939, and with applicable general law as set forth in the accompanying brief?

(c) Is not the decision that where a third person has paid money to an agent under false inducement, the third person may not elect to make claim against the agent for money had and received under Sec. 63 (a) (4) of the Bankruptcy Act, rather than in tort for damages, in conflict with

(i) applicable local decisions in Hack v. Crain (Mo. Sup., 1915), 177 S. W. 587, 589; Clifford Banking Co. v. Donovan Commission Co. (1906), 195 Mo. 262, 288, 94 S. W. 527, 535; McClure v. H. R. Ennis R. E. and Inv. Co. (1925), 219 Mo. App. 112, 268 S. W. 675, and Webster v. Sterling Finance Co., 351 Mo. 754, 757, 173 S. W. (2d) 928, 931, and with applicable general law as set forth in the accompanying brief;

(ii) the decision on the same matter of the Second Circuit Court of Appeals in In Re International Match Corp. (C. C. A. 2d, 1934), 69 Fed. (2d) 73, 75; and,

(iii) applicable decision of this Court in Crawford v. Burke, 195 U. S. 176, 193, 25 S. Ct. 9, 49 L. Ed. 147, 154?

(d) Is not the decision that the principal rather than the interveners are entitled to proceeds of the fraud perpetrated by the agent on the interveners, where, as here, the agent was the "Sole Actor," in conflict with

(i) the decisions on the same matter of the 2nd, 5th, 7th and 10th Circuit Courts of Appeals in Munroe v. Harriman (C. C. A. 2nd, 1936), 85 Fed. (2d) 493, 495, 111 A. L. R. 657; Connecticut Fire Ins. Co. v. Commercial Nat. Bank (C. C. A. 5th, 1937), 87 Fed. (2d) 968, 969; Bosworth v. Maryland Casualty Co. (C. C. A. 7th, 1935), 74 Fed. (2d) 519, 521; and Queenan v. Mays (C. C. A. 10th, 1937), 90 Fed. (2d) 525, 530;

(ii) applicable decisions of this Court in Curtis, Collins & Holbrook Co. v. United States, 262 U. S. 215, 224, 43 S. Ct. 570, 573, 67 L. Ed. 956, 960; and Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 637, 20 S. Ct. 498, 44 L. Ed. 611, 618; and,

(iii) applicable local decision in Clifford Banking Co. v. Donovan Commission Co. (1906), 195 Mo. 262, 288, 94 S. W. 527, 535?

(e) Is not the decision that damages are essential to the third person's claim for restitution in conflict with

(i) applicable local decision in First National Bank v. Produce Exchange Bank (1935), 338 Mo. 91, 99, 89 S. W. (2d) 33, 38, and with applicable general law as set forth in the accompanying brief; and

(ii) the decision on the same matter of the Second Circuit Court of Appeals in Second National Bank of Toledo v. M. Samuel & Sons (C. C. A. 2nd Cir., 1926), 12 Fed. (2d) 963, 967?

Third: Whether in determining the provability of interveners' claims, local law or Federal law is controlling?

REASONS RELIED ON FOR ALLOWING THE WRIT.

A. As to First Question Presented:

I.

In holding that small claims for current accounts should be counted in determining whether the bankrupt's creditors are less than 12 in number, where a sole petitioner has instituted an involuntary proceeding under Section 59 (b) of the Bankruptcy Act, the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

Neither this Court nor any Court of Appeals, save the Court below, has decided this question.

The question involves the right of a single creditor to institute an involuntary proceeding when otherwise three petitioning creditors are required. This right was contained in the first Bankruptcy Act of 1800, renewed in the Act of 1841, and has been continued under varying conditions in all the subsequent Acts. It is one of the most important rights on the creditor side of the Bankruptcy Act.

(a) The lower Courts are divided as follows:

Decisions excluding small-current-account Creditors:

W. A. Gage & Co. v. Bell (D. C. Tenn., 1903), 124 Fed. 371, 377;

In re Blount (D. C. Ark., 1906), 142 Fed. 263, 269;

Matter of Burg (D. C. Texas, 1917), 245 Fed. 173, 174;

Matter of Branche (D. C. N. Y., 1921), 275 Fed. 555, 557;

Security Bank and Trust Co. v. Tarlton (D. C. Tenn., 1923), 294 Fed. 698, 701.

Decisions including small-current-account Creditors:

Matter of Alden (D. C. Mass., 1924), 2 Fed. (2d) 61, 62;

Matter of Hall (D. C. Penn., 1928), 27 Fed. (2d) 999, 1000;

Grigsby-Grunow Co. v. Hieb Radio Supply Co. (C. C. A. 8th, 1934), 71 Fed. (2d) 113;

In re Murray, 14 Fed. Sup. 146, 147.

(b) The decision of the Court of Appeals seriously impairs, if not destroys, this right.

A number of small-current-account creditors are usually present in every case. If they are to be counted, the right of a sole petitioner to maintain an involuntary proceeding is illusory.

House Committee on the Judiciary, Report No. 1409, pp. 14, 17, accompanying H. R. 8046 (the Chandler Bill), 96th Congress, First Session, July 29, 1937;

Commerce Clearing House, Bankruptcy Law Service, Law Compilation, 3rd Ed., p. 4043, par. 5543.

(c) The decision of the Court of Appeals enables the holders of small-current-account claims with little at stake to prevent the administration in bankruptcy of a debtor's estate and thereby to defeat the interests of a substantial creditor, contrary to the spirit of the Chandler Act.

Report No. 1409, supra.

(d) The Court of Appeals for the Eighth Circuit has ruled inconsistently as to the effect to be given to small claims.

In Houchin Sales Co. v. Angert (C. C. A. 8th, 1906), 11 Fed. (2d) 115, the Court refused to recognize a transfer of $50 as a preferential transfer constituting an Act of

Bankruptcy and applied the maxim, de minimis non curat lex. However, in Grigsby-Grunow Co. v. Hieb Radio Supply Co. (C. C. A. 8th, 1934), 71 Fed. (2d) 113, the Court held that small-current-account claims should be counted in determining the total number of the bankrupt creditors, and refused to apply the above maxim.

(e) The Court of Appeals for the Eighth Circuit has ruled inconsistently in construing the effect of the express exclusions set out in Section 59 (e) of the Act.

In Stevens v. Nave-McCord Mercantile Co. (C. C. A. 8th, 1906), 150 Fed. 71 (where the proceeding was instituted by a sole petitioner), the Court refused to include in the count creditors who had received preferential transfers, before such creditors were expressly excluded under Section 59 (e) of the Act. However, the Court in Grigsby-Grunow Company v. Hieb Radio Supply Co., supra, included small-current-account creditors in the count because they were not expressly excluded by Section 59 (e). In the latter case the Court applied the maxim, expressio unius est exclusio alterius, but refused to apply it in the former case.

(f) The better reasoned decisions exclude from the count small-current-account creditors in determining the total number of creditors, because such creditors are practically secured creditors and their lack of interest restrains them from joining against their debtor.

In re Blount (D. C. Ark., 1906), 142 Fed. 263, 269;
Matter of Burg (D. C. Texas, 1917), 245 Fed. 173, 174;
Matter of Branche (D. C. N. Y. 1921), 275 Fed. 555, 557;
Security Bank and Trust Co. v. Tarlton (D. C. Tenn., 1923), 294 Fed. 698, 701;
W. A. Gage & Co. v. Bell (D. C. Tenn., 1903), 124 Fed. 371, 377.

(g) The significance of the amount of creditors' current-account claims is a relative matter dependent upon the financial status of the debtor, and the small-current-account claims challenged in the case at bar should be excluded.

Security Bank and Trust Company v. Tarlton (D. C. Tenn., 1923), 294 Fed. 698, 701.

II.

In holding that the express exclusion in Sec. 59 (e) of certain classes of creditors prevents the exclusion of any class not so expressly excluded, the Court of Appeals has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter.

The First Circuit Court of Appeals in Myron M. Navison Shoe Co. v. Lane Shoe Co. (C. C. A. 1st, 1929), 36 Fed. (2d) 454, 457, and in Leighton v. Kennedy (C. C. A. 1st, 1904), 129 Fed. 737, 739, and the Tenth Circuit Court of Appeals in International Shoe Co. v. Smith-Cole, Inc. (C. C. A. 10th, 1933), 62 Fed. (2d) 972, 974, by excluding preferred creditors, in effect held that the express exclusions in Sec. 59 (e) did not prevent the exclusion of other classes of creditors before such other classes were expressly enumerated in Sec. 59 (e).

III.

In holding that creditors having unsubstantial claims should be counted the Court of Appeals has rendered a decision in conflict with the First Circuit Court of Appeals on the same matter in Leighton v. Kennedy (1st C. C. A., 1904), 129 F. 737, 739, where such claims were excluded from the count.

IV.

Proper administration of the Bankruptcy Act warrants this Court in settling the question.

Until this Court settles this question the right of a sole petitioner under Sec. 59 (b) is fraught with such peril from these small-current-account creditors "usually" present as to be practically unavailable and the counting of creditors under 59 (d) and (e) is futile. The elaborate procedure set up for counting creditors becomes useless if small-current-account creditors are to be counted.

B. **As to Second Question Presented:**

I.

In holding that the interveners have no provable claims under Section 63 (a) (4) of the Bankruptcy Act, the Court of Appeals has decided an important question of local law, in a way probably in conflict with applicable local decisions, in that:

(a) Its ruling that respondent committed no fraud upon interveners is in conflict with McClure v. H. R. Ennis R. E. and Inv. Co. (1925), 219 Mo. App. 112, 120, 268 S. W. 675, 677; Hays v. Smith (Mo. Sup., 1919), 213 S. W. 451, 454, and Hack v. Crain (Mo. Sup., 1915), 177 S. W. 587, 589. He took money for a non-existent contract.

Its ruling is also in conflict with the following applicable general law:

Lear v. Bawden (1924), 75 Colo. 385, 387, 225 Pac. 831;

Kilgore v. Bruce (1896), 166 Mass. 136, 138, 44 N. E. 108, 109;

Isenbeck v. Burroughs (1914), 217 Mass. 537, 539, 105 N. E. 595, 596;

Hokanson v. Oatman (1911), 165 Mich. 512, 517, 131 N. W. 111, 113;
Stevens v. Reilly (1916), 56 Okla. 455, 462, 156 Pac. 157, 159;
Cook v. Skinner (1908), 50 Wash. 317, 319, 97 Pac. 234, 235;
Collins v. Philadelphia Oil Co. (1924), 97 W. Va. 464, 470, 125 S. E. 223, 225;
Estes v. Crosby (1920), 171 Wis. 73, 79, 175 N. W. 933, 935;
2 Restatement, Law of Agency, 763, Sec. 348, Comment (d).

(b) Its ruling that a contract existed between interveners and the Committee is in conflict with Section 4587, R. S. Mo. 1939, defining forgery, and with Carson v. Woods (Mo. Sup., 1915), 177 S. W. 623, 626, and McClure v. H. R. Ennis R. E. and Inv. Co., 219 Mo. App. 112, 120, 268 S. W. 675, 678.

Its ruling is also in conflict with the following applicable general law:

Vickrey v. Ritchie (1909), 202 Mass. 247, 249, 88 N. E. 835, l. c. 835;
Dock Contractor Co. v. Niagara Falls Power Co. (D. C. N. Y., 1921), 274 Fed. 852, 855;
Nelson v. Rohweder (1920), 147 Minn. 325, 328, 180 N. W. 223, 225;
6 Williston on Contracts (Rev. Ed. 1938), 5352, Sec. 1913;
2 C. J., Alteration of Instruments, 1224, Sec. 91.

(c) Its ruling that the interveners have no independent claims against respondent, and that respondent is liable only to his principal, is in conflict with Hack v. Crain (Mo. Sup., 1915), 177 S. W. 587, 589; Patzman v. Howey, 340 Mo. 11, 22, 100 S. W. (2d) 851, 856, and Tillman v. Bungenstock (1914), 185 Mo. A. 66, 68, 171 S. W. 938, 939.

Its ruling is also in conflict with the following applicable general law:

3 C. J. S., Agency, 129, Sec. 220;
2 Restatement, Law of Agency, 760, Sec. 348;
Note in 82 A. L. R. 312 (1933);
Peterson v. McManus (1919), 187 Ia. 522, 547, 172 N. W. 460, 469;
Inland Waterways Corp. v. Hardee (App's. Dist. Col. 1938), 100 Fed. (2d) 678, 685;
Bocchino v. Cook (1902), 67 N. J. L. 467, 468, 51 Atl. 487;
Phetteplace v. Bucklin (1893), 18 R. I. 297, 300, 27 Atl. 211, 212;
Moore v. Shields (1889), 121 Ind. 267, 273, 23 N. E. 89, 91;
Hardy v. American Export Co. (1902), 182 Mass. 328, 329, 65 N. E. 375, 376, 59 L. R. A. 731, 732;
Alexander v. Coyne (1915), 143 Ga. 696, 698, 85 S. E. 831, 832, L. R. A. 1916 D, 1039, 1041;
Hoining v. Federal Reserve Bank (C. C. A. 8th, 1931), 52 Fed. (2d) 382, 387, 82 A. L. R. 297.

(d) Its ruling that interveners may not elect to claim for money had and received rather than in tort is in conflict with Hack v. Crain (Mo. Sup., 1915), 177 S. W. 587, 589; Clifford Banking Co. v. Donovan Commission Co. (1906), 195 Mo. 262, 288, 94 S. W. 527, 535; McClure v. H. R. Ennis R. E. and Inv. Co. (1925), 219 Mo. App. 112, 268 S. W. 675, and Webster v. Sterling Finance Co., 351 Mo. 754, 757, 173 S. W. (2d) 928, 931.

Its ruling is also in conflict with the following applicable general law:

Isenbeck v. Burroughs (1914), 217 Mass. 537, 105 N. E. 595;
Hokanson v. Oatman (1911), 165 Mich. 512, 131 N. W. 111;
Cook v. Skinner (1908), 50 Wash. 317, 97 Pac. 234;

Crawford v. Burke (1904), 195 U. S. 176, 25 S. Ct. 9, 49 L. Ed. 147;
Restatement, Restitution, 673, Sec. 166.

(e) Its ruling that interveners have no claims unless they have suffered damages is in conflict with First National Bank v. Produce Exchange Bank (1935), 338 Mo. 91, 99, 89 S. W. (2d) 33, 38.

Its ruling is also in conflict with the following applicable general law:

Federal Sugar Refining Co. v. United States Sugar Equalization Board, Inc. (S. D. N. Y., 1920), 268 Fed. 575, 582;
Caskie v. Philadelphia Rapid Transit Company (1936), 321 Pa. 157, 161, 184 Atl. 17, 19, 106 A. L. R. 318, 321;
Second National Bank of Toledo v. M. Samuel & Sons (C. C. A. 2nd Cir., 1926), 12 Fed. (2d) 963, 967;
Heywood v. Northern Assurance Co. (1916), 133 Minn. 360, 366, 158 N. W. 632, 634;
Bates-Farley Sav. Bank v. Dismukes (1899), 107 Ga. 212, 219, 33 S. E. 175, 178;
Bosworth v. Wolfe (1928), 146 Wash. 615, 623, 264 Pac. 413, 417;
Duplate Corp. v. Triplex Safety Glass Co. (1936), 298 U. S. 448, 457, 56 S. C. 792, 796, 80 L. Ed. 1274, 1281;
Hamilton-Brown Shoe Co. v. Wolf Brothers & Co. (1916), 240 U. S. 251, 259, 36 S. Ct. 269, 272, 60 L. Ed. 629, 634.

II.

In holding that interveners may not elect to claim for money had and received — under the Implied Contract Clause of Section 63 (a) (4) of the Bankruptcy Act — the Court of Appeals has rendered a decision in conflict with the following decision of another Circuit Court of Appeals on the same matter:

In re International Match Corp. (C. C. A. 2d, 1934), 69 Fed. (2d) 73, 75,

and has decided a Federal question in a way probably in conflict with the following applicable decision of this Court:

Crawford v. Burke, 195 U. S. 176, 193, 25 S. Ct. 9, 49 L. Ed. 147, 154.

III.

In holding that the principal rather than the interveners is entitled to proceeds of the fraud perpetrated by the agent on the interveners, the Court of Appeals has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter (under the "Sole Actor" Doctrine, the Committee, had it received the money from the agent, could claim title only by virtue of respondent's fraud, and would have to accept it burdened with respondent's knowledge of the defect in title), as follows:

Munroe v. Harriman (C. C. A. 2nd, 1936), 85 Fed. (2d) 493, 495, 111 A. L. R. 657;

Connecticut Fire Ins. Co. v. Commercial Nat. Bank (C. C. A. 5th, 1937), 87 Fed. (2d) 968, 969;

Bosworth v. Maryland Casualty Co. (C. C. A. 7th, 1935), 74 Fed. (2d) 519, 521;

Queenan v. Mays (C. C. A. 10th, 1937), 90 Fed. (2d) 525, 530;

with the following applicable decisions of this Court:

Curtis, Collins & Holbrook Co. v. United States, 262 U. S. 215, 224, 43 S. Ct. 570, 573, 67 L. Ed. 956, 960;

Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 637, 20 S. Ct. 498, 44 L. Ed. 611, 618;

and with the following applicable local decision:

Clifford Banking Co. v. Donovan Commission Co. (1906), 195 Mo. 262, 288, 94 S. W. 527, 535.

C. **As to Third Question Presented:**

In order to avoid confusion in the administration of the Bankruptcy Act, this Court should settle whether local law or Federal law is controlling in determining the provability of interveners' claims. It is believed that the one or the other is controlling, and therefore the exercise of this Court's power of supervision is called for to avoid departure by the Court of Appeals from the law controlling.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 78, 58 S. C. 817, 822, 82 L. Ed. 1188, 1194;

Guaranty Trust Co. v. York (June 18, 1945, not yet officially reported), 89 L. Ed. 1418, 65 S. C. 1464, 1470.

PRAYER.

For the foregoing reasons, which are developed in more detail in the accompanying brief, your petitioners pray that a Writ of Certiorari issue out of this Court to the United States Circuit Court of Appeals for the Eighth Circuit commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the Record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that

this case may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that your petitioners be granted such other and further relief as may be proper.

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January 9, 1946.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case is reported in 151 Fed. (2d) 397, and appears on pages 221 to 226 of the transcript of the record filed herewith.

JURISDICTION OF THIS COURT.

The opinion and judgment of the Circuit Court of Appeals herein were filed on October 29, 1945 (R. 222, 226). The petitioners filed their petition for rehearing on November 13, 1945 (R. 227), which petition was denied on December 5, 1945 (R. 261). On December 14, 1945, the Circuit Court of Appeals stayed the mandate for thirty days, pending petitioners' Application for Writ of Certiorari (R. 261). The jurisdiction of this Court is invoked under Sec. 24, c, of the Bankruptcy Act (11 U. S. C. A., Sec. 47, c), and Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A., Sec. 347 (a).

STATEMENT OF THE CASE.

The original petition (R. 6) was filed on July 27, 1944. The original petitioner's claims aggregate $60,862.45 (R. 32, 33). The respondent with his answer listed (R. 49) 22 unsecured creditors. As to 16 creditors on this list, the Referee correctly found (R. 53):

> "This list shows that 16 of the 22 creditors have claims respectively for amounts less than $50.00 and that 13 of that number have claims which range from $6.00 to $30.00. The above named 16 creditors could be classified as representing household and personal expenses of the alleged bankrupt for groceries, doctor

bills, drugs, auto repairs, clothing, telephone and minor household repairs. They are similar to the usual monthly bills that any head of a family would normally incur."

The 16 challenged claims are as follows (R. 49):

	Name	Amount	Date	For
1*	Lionberger's Auto Repair	$ 22.50	7/ 7/44	Repairs on auto
2	Southwestern Bell Tel. Co.	28.69	6/23/44 to 7/16/44	Telephone bill
3	Frederick Jewelry Co.	14.00	7/13/44	Jewelry
4	Hastons Cleaners	20.10	6/ 1/44 to 7/27/44	Dry cleaning
5	Owens Grocery Co.	6.00	6/20/44	Groceries
6	Cleveland Gro.	29.29	6/22/44 to 7/27/44	Groceries
7	McClintic Gro.	11.82	7/15/44	Groceries
8	North Missouri Lbr. Co.	11.22	7/12/44	Air conditioners
12	Ellis Clothing Co.	29.40	7/27/44	Clothing
13	Clark's Pharmacy	6.00	7/15/44	Drugs
14	Dr. M. M. Russell	25.00	7/10/44	Medical services
15	Markey Tin Shop	40.00	6/ 1/44	Gutter on Bldg.
16	B. S. Fraley	35.00	7/20/44	Meat
17	Parsons Barber Shop	10.00	6/ 1/44 to 7/27/44	Barber work
18	Guy Cox	6.00	7/12/44	Services on car
20	John Owens	45.00	1/10/43	Balance on mule
	Total	$340.02		

* These numbers correspond to the numbers on the respondent's list, Exhibit A (R. 49).

Of the above 16 claims, 13 were contracted in July, 1944 (four having June to July dating), the month in which the original petition was filed. Two of the remaining three were contracted in June, 1944. The 13 July bills were not due until August or until after the filing of the petition in bankruptcy. They are current accounts. The 16 claims aggregate $340.02, or .0056 of the original petitioner's claims. None of these claims exceed $45.00 in amount; 13 are for less than $30.00 and six are for less than $12.00 each. As to nature, four are for groceries and meat; seven are for repairs and service; two are for medical bills and drugs; one is for clothing; one is for jewelry and the other is for balance due on a mule.

The respondent listed his assets at $278,500.00 (R. 27,

50, 51). He valued his residence and its furnishings at $24,000.00; Texas lands and personalty, $190,000.00; securities, $54,000.00; other personal property, $10,500.00. He listed secured claims, $83,078.00 (R. 27, 50, 51); unsecured claims, $9,859.52 (R. 49). He did not list the original petitioner nor the interveners as creditors in any amounts.

The claims of 11 of the 16 creditors last mentioned aggregate but $161.33 (the largest of which is $28.69), or .0027 of the original petitioner's claims. If the above 16 creditors or even the last mentioned 11 of them are not counted, then respondent's creditors are less than 12 in number. The original petitioner contended that these small-current-account creditors should not be counted under the Bankruptcy Act, as amended by the Chandler Act of 1938. The Referee held (R. 52) that the small-current-account creditors should be counted in computing the total number of creditors, and on October 4, 1944, ordered the proceeding dismissed (R. 59).

The Committee resides at St. Louis, Mo. (R. 73). Interveners and respondent reside in or near Chillicothe, Livingston County, Mo. (R. 63, 76). The Committee owned land in Livingston and Linn Counties, Mo. Respondent was the Committee's field agent (R. 135). Respondent held the title to these lands in his name, but for the use and benefit of the Committee (R. 139).

Although respondent made no representation as to the nature, the quality or the value of the land, he was guilty of a far reaching misrepresentation as to the nature and substance of the transaction. There was a series of misrepresentations. At the beginning respondent represented that he would forward the offer received from the intervener (R. 86, 111, 136); he did not intend to do this since it is obvious that he had the scheme to defraud in mind at that time. In each transaction, he withdrew page 2 (which recited the larger sum as the sale price) from the

genuine instrument signed by the intervener and substituted therefor page 2 (which recited the smaller sum as the sale price) in the instrument which he presented to his principal for its signature. After this first substitution and after making misrepresentation to his principal by which he obtained the principal's signature to an instrument, the last page of which bore the signature of the intervener, but which was not the instrument signed by the intervener (R. 86, 112, 136), respondent withdrew page 2 (which recited the smaller sum as the sale price) from the genuine instrument signed by the Committee, and presented to the intervener the false sale contract produced by connecting together with the remaining pages of the instrument signed by the Committee, page 2 (which contained the larger sum as the sale price) previously withdrawn by him from the genuine instrument which had been signed by the intervener (R. 87, 112, 136). Respondent returned the false instrument to the intervener with the signature of his principal upon the last page (R. 87, 112, 136). This was a misrepresentation to the intervener since the principal had not signed the instrument and since respondent had not in fact communicated the intervener's offer to his principal. He represented that his principal was bound by the spurious contract (R. 87, 113, 136). He represented that when he received the payment from the intervener he would transmit it to his principal (R. 87, 113, 136), although he did not intend so to do. He misrepresented to the intervener the higher sum as his principal's sale price. As a result of this series of misrepresentations, he obtained the money from the intervener (R. 66, 69, 76).

The sale instruments expressly provided that the Committee's personal signature was essential to their effectiveness. The express condition referred to, which was common to each instrument, reads as follows (R. 97, 121, 143):

"It is further understood and agreed that this contract shall not be binding or obligatory on first parties until after they have duly approved and **signed** the same, it being understood that this contract, although first signed by second party, shall first be submitted to first parties for their approval and the same shall not be or become binding on first parties in any way until they have duly executed the same. First parties are to approve or reject this contract on or before the 18th day of January, 1941." (Emphasis ours.)

The following is the allegation in Barnhart's claim (R. 76), the substance of which allegation was common to the claims of the other two interveners (Rec., pp. 66, 69):

"On or about December 12, 1939, the said Durward Belmont Luther falsely and fraudulently represented to your petitioner that your petitioner was obligated to pay to said Luther the sum of Four Hundred Forty and 00/100 Dollars ($440.00) as part of the purchase price of a certain tract of land located in Grand River Drainage District, in Livingston County, Missouri, under a pretended contract, by said Luther delivered or caused to be delivered to your petitioner, purporting to be for the sale of said tract of land to your petitioner, to be dated November 17, 1939, and **to be signed** by your petitioner, as vendee, and by Wyllys K. Bliss, W. L. Hager and Harry Theis, as the Bondholders' Protective Committee in the matter of certain bonds of the Grand River Drainage District of Livingston and Linn Counties, Missouri, as vendors, whereas, in truth and fact, as said Luther well knew, the said pretended contract **was not signed** by said committee and there was no such contract; your petitioner was not so obligated to make such payment to said Luther, and said payment was not part of the purchase price of said land but was unjust enrichment to said Luther. Your petitioner by mistake, caused or induced by believing the said false and fraudulent representation of said Luther intended or calculated as aforesaid to cause or induce your peti-

tioner to make said payment, and by relying on such false and fraudulent representation and being so deceived, paid the said Four Hundred Forty and 00/100 Dollars ($440.00) to the said Luther." (Emphasis ours.)

The sufficiency of interveners' claims cannot be adjudged upon the allegations of the Committee's claims, but if the Court of Appeals did consider the Committee's allegation that respondent was employed "to negotiate and consummate sales" (R. 31), authority to negotiate, in view of the express condition requiring the signature of the Committee does not of course imply power in the respondent to execute the contracts. That this fact of lack of authority to execute contracts was well recognized by respondent himself is established by his very switching of the second pages. His sole authority, as concurrently alleged by the Committee, was "to develop sales therefor and recommend to your petitioners, based upon his knowledge of such highest and best prices, as to acceptance or rejection by your petitioners of offers to purchase said lands resulting from his said efforts" (R. 31).

STATUTES INVOLVED.

Section 59 (b) (d) (e) and (f) of the Bankruptcy Act, 11 U. S. C. A., Section 95 (b) (d) (e) and (f) [portions deleted by the Chandler Act are shown in brackets; portions added by the Chandler Act are shown in italics], provides:

> "(b) Three or more creditors who have provable claims *fixed as to liability and liquidated as to amount* against any person which amount in the aggregate in excess of the value of securities held by them, if any, to $500 [five hundred dollars] or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

"(d) If it be averred in the petition that the creditors of the bankrupt, *computed as provided in subdivision e of this section,* are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses *and a brief statement of the nature of their claims and the amounts thereof,* and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that *the* parties in interest shall have an opportunity to be heard. If upon such hearing it shall appear that a sufficient number *of qualified* creditors have joined in such petition or, if prior to or during such hearing, a sufficient number *of qualified creditors* shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

"(e) In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, *there shall not be counted (1)* such creditors as were employed by the *bankrupt* [him] at the time of the filing of the petition; *(2) creditors who* [or] are *relatives of the bankrupt or, if the bankrupt is a corporation, creditors who are stockholders or members, officers or members of the board of directors or trustees or of other similar controlling bodies of such bankrupt corporation; (3) creditors who have participated, directly or indirectly, in the act of bankruptcy charged in the petition; (4) secured creditors whose claims are fully secured; and (5) creditors who have received preferences, liens, or transfers void or voidable under this title* [related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition shall not be counted].

"(f) Creditors other than *the* original petitioners

may at any time enter their appearance and join in the petition." [, or file an answer and be heard in opposition to the prayer of the petition.]

Section 4587, R. S. Mo. 1939 (Vol. 1, p. 1092), provides:

"**Section 4587. Attaching together genuine instruments, when forgery.** When different parts of several genuine instruments shall be so placed or connected together as to produce one instrument, with intent to defraud, the same shall be deemed forgery in the same manner and in the same degree as if the parts so put together were falsely made or forged."

SPECIFICATIONS OF ERROR TO BE URGED.

The Court of Appeals erred

1. In holding that creditors with small claims for current accounts should be counted in computing the number of respondent's creditors under Sec. 59 (b) of the Bankruptcy Act.

2. In holding that respondent committed no fraud upon interveners.

3. In holding that in each of the transactions with interveners there was a valid sale contract.

4. In holding that attaching together different parts of two several genuine instruments so as to produce one false instrument with intent to defraud was not forgery.

5. In holding that the agent is without liability to interveners because of his duty to account to his principal.

6. In holding that intervener may not elect to claim for money had and received under Sec. 63 (a) (4) of the Bankruptcy Act rather than for damages in tort.

7. In refusing to hold that the interveners are entitled to recover for money had and received, even though they suffered no damages.

8. In failing to follow either local or Federal law in determining the provability of interveners' claims.

ARGUMENT.

A. ARGUMENT AS TO FIRST QUESTION PRESENTED.

QUESTION ONE, POINT I.

Under the Chandler Act (1938) Creditors With Small Claims for Current Expenses Are Not to Be Counted Among the Total Number of the Bankrupt's Creditors in Determining Whether They Are Less Than Twelve.

The right of a single petitioner to maintain an involuntary petition in bankruptcy against his debtor is a substantial, and not an illusory right given creditors by the Act.

The abusive use of the Act by a number of creditors having small claims as against fewer but more substantial creditors, appeared under the Act of 1867 (14 Stat. 536, Chap. 176, Sec. 39). Beginning with the Amendatory Act of 1874 (18 Stat. 180, 181, 182, Chap. 390, Sec. 12), as will presently appear, this power of small-claim creditors to dominate a bankruptcy proceeding has been gradually curtailed, by subsequent Acts and by "case made law."

The machinery set up by the Amendatory Act of 1874, supra, for the curtailment of the power of small creditors to invoke the provisions of the Act, was the requirement that where the bankrupt denied in his answer the sufficiency in number of the petitioning creditors, he should file a full list of his creditors showing the "sums due them respectively," and further provided that in computing the number of creditors, those whose claims were less than $250.00 should not be counted, unless there be no creditors with claims in excess of $250.00, or if there be such creditors and they fail to join in the petition. See 18 Stat. 182,

Chap. 390, Sec. 12. This act of 1867, as amended, was repealed in 1878.

The next Act (1898), 30 Stat. 561, 562, Chap. 541, Sec. 59, 11 U. S. C. A., Sec. 95, did not contain the requirement that the bankrupt should disclose in the list filed with his answer the nature of his creditors' claims and the amounts thereof. It expressly excluded only two classes of creditors (employees and relatives), but it did not not expressly exclude small-current-account claims. (None of the Acts have expressly excluded small-current-account claims.) Nevertheless, under this Act, one line of decisions held that the bankrupt must disclose in his answer the nature of their claims and the amounts due his respective creditors and small-current-account claims were not counted, (1) on the ground that they are practically secured, and (2) by application of the maxim "De minimis non curat lex." These decisions declared "case made law." Another line of decisions under this Act held that since this Act did not expressly exclude small-current-account claims they should be counted under the maxim, "Expressio unius est exclusio alterius." These decisions made no "case law," but followed the Act literally. This distinction is important here, as we will hereafter point out.

The Chandler Act by amendment to Sec. 56c expressly curtailed the voting power of small claimants in matters submitted at creditors' meetings.* By eliminating old Sec. 55d, it expressly curtailed their power to prevent the call of a special meeting of creditors.** Pertinent to the situation at bar, the Chandler Act placed in Sec. 59 (d)

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* By amendment of Sec. 56c, claims of $50.00 or less shall not be counted in computing the number of votes, but only in computing the amount.

** By omitting old Sec. 55d and enacting new Sec. 55d, a special meeting of creditors may be called by one-fourth in number of creditors rather than by a request in writing by all creditors, and the majority in number and amount of such creditors may designate the place for holding the meeting.

the requirement (from the amendatory Act of 1874) that the bankrupt should include with his list a "brief statement of **the nature** of their claims and **the amounts** thereof." (Emphasis ours.)

The replacement in Sec. 59d of the 1938 Act of the provision of the Act of 1874 requiring the bankrupt to list the nature and amount of the claims of his respective creditors is evidence of the intent of Congress to make provision for the exclusion of small-current-account claims as being secured for all intents and purposes of the Bankruptcy Act and application of the "de minimis" maxim.

Congress intended (as disclosed by the Report of the House Committee on the Judiciary) that this provision (disclosure of nature and amounts of creditors' claims) in the 1938 Act should serve the same purpose as it was intended to serve in the Act of 1874. That purpose was stated by the Court in **W. A. Gage & Co. v. Bell** (D. C. Tenn., 1903), 124 Fed. 371, l. c. 377 et seq. (which arose under the 1898 Act), as follows:

> "But by section 12 of the Amendatory Act of June 22, 1874 (18 Stat. 178, 180, ch. 390), provision was made against trivial debts being used to sustain an involuntary petition, presumably to meet the experience had in that regard under the original act.
>
> * * * * * * *
>
> "Costly bankruptcies, instituted by creditors with trivial debts, not amounting in the aggregate to more than $250.00, and very small in amounts due each creditor, were distasteful to public opinion, as being trifling with the process of the courts about matters not worthy of such attention. The foregoing provision of the Amendatory Act was a protest against such petty litigation, and yet, as will be observed, Congress was not quite willing to cut off small creditors altogether from the remedy by bankruptcy procedure. Later disgust with the act for this and other reasons

swept it off the statute book. The Act of 1898 seems to tolerate voluntary and involuntary proceedings based on the smallest debts, but this history concerning the old act should warn those resorting to the new not to abuse it for petty litigation, even if thought to be permissible under it.

* * * * * * *

"But counsel for the petitioning creditor, Gage & Co., forcibly contend that, if that maxim (De minimis non curat lex) is to defeat a creditor with an indebtedness of over $8,000 from challenging the legality of transfers of property given to prefer other creditors for quite as large a value, **it ought also to be turned the other way, and used to expunge from the count the petty debts set up by the defendant debtor, leaving him a debtor with less than twelve creditors, and so maintaining a petition by a single creditor with an amount large enough to command respect as against the maxim.**" (Emphasis ours.)

Unless the nature and the respective amounts of the claims are to be considered by the court, then the requirement that they be set out has no meaning. Historical analysis (by reference to the cases which enforced the requirement by "case made law" prior to the Chandler Act) shows that the requirement was to avoid the abuse which ensues where small-current-account claims are used to defeat the other provisions of the Act, one of which gives a sole creditor a right to file a petition when the creditors are less than 12.

Even though the requirement to state the nature and amount was not included in the 1898 Act, yet, under that Act the prevailing practice required the nature and amount to be stated and the "case made" law excluded small-current-account claims.

Judge Trieber (D. C. Ark. 1906), in **In re Blount**, 142 Fed. 263, held that current accounts for groceries, dry

goods, drugs, laundry, rent and other necessaries for the use of the family charged during the month and customarily paid upon presentation during the first part of the succeeding month, should not be counted. He said (l. c. 269):

> "It is hardly reasonable to suppose that creditors of that kind, who feel secure in having their bills promptly paid, would want to incur the risk of losing a good customer in order to join a bona fide creditor to institute proceedings in bankruptcy. All laws must be given a reasonable construction, and for this reason the claims hereinbefore recited must be disregarded in determining the number of the creditors of Mr. Blount at the time these proceedings were instituted, and if this is done it clearly appears that there were less than 12 creditors. The fact that most of these creditors could have maintained an action and recovered judgment against Blount cannot change the rule, for a creditor whose debt is fully secured may maintain an action and recover judgment without surrendering his security, but he cannot prove his claim in bankruptcy proceedings unless he surrenders the same. The maxim 'De minimis non curat lex' may also be properly applied."

In the Blount case the total assets of the bankrupt were only $4,845.53 and, of course, the current accounts were relatively small in comparison with Luther, who lists assets at $278,500.00.

In the **Matter of Burg** (D. C. Texas, 1917), 245 Fed. 173, the claim of the petitioner was for $6,988.19, and the assets of the bankrupt amounted to $9,005.11. The bankrupt listed 25 creditors. Of these the court said (l. c. 174):

> "Only three of them were for more than $100, the highest being for $252.56, and twelve of them were for sums under five dollars. These small claims were current accounts for groceries, drugs, dry goods, milk,

> gas and oil, telegrams, telephone bills, water, light and gas bills, etc., such as are contracted and paid for from month to month. Such creditors are practically secured, as their bills have to be paid from month to month before further necessities can be obtained. The bankruptcy law is never invoked by any such small creditors, who themselves have adequate remedy for the collection of their accounts by cutting off further supplies. As to these accounts, I think the maxim 'De minimis non curat lex' applies."

In the Burg case the bankrupt was a small operator "who had been working as a clerk in an implement house". In the case at bar, the respondent lives in a residence listed as worth $20,000.00, his household furnishings as worth $4,000.00, a salary at $5,000.00 per year, to say nothing of stocks, bonds and holdings in Texas.

In the **Matter of Branche** (D. C. N. Y. 1921), 275 Fed. 555, the claim of the petitioner was $13,419.00 and total debts amounted to $16,000.00. The bankrupt listed 18 creditors, including claims for rent, nurses' bills, storage charges, drug charges and club dues. The New York Court excluded these claims as being for all intents and purposes secured, saying (l. c. 557):

> "In this case the bills referred to were contracted to be paid monthly, were secured for all intents and purposes of the Bankruptcy Law, and the creditors could refuse further credit, unless the bills complained of were paid upon specified times."

To the same effect see **W. H. Gage & Co. v. Bell** (D. C. Tenn., 1903), 124 Fed. 371, supra.

In **Security Bank and Trust Co. v. Tarlton** (D. C. Tenn., 1923), 294 Fed. 698, the Court said (l. c. 701):

> "No certain amount could well be established as to the maximum which might be claimed as a 'debt'

under such circumstances, and the relative rights of the parties must be taken into consideration in determining the question of the number of creditors."

As to preferential transfers, the Court of Appeals in **Houchin Sales Co. v. Angert** (C. C. A. 8th, 1926), 11 Fed. (2d) 115, decided under the 1898 Act, held that small amounts should be disregarded. The petitioning creditor's claim was $14,000.00. The bankrupt's assets were $13,522.26 and liabilities $17,646.57. The transfer alleged to be preferential was a payment of $50.00 on a $100.00 account. The Court said (l. c. 117):

> "The maxim, 'De minimis non curat lex', is applicable to the situation. Text-books and decisions unite in asserting the doctrine that, while the payment of money is a transfer of property under the Bankruptcy Act, it must be substantial, and not trivial, to justify a proceeding in bankruptcy on the ground of preferred payment to creditors.
>
> "Loveland on Bankruptcy, pp. 310, 317, says: 'It has been held that every trivial payment is not necessarily a preference. It must be a substantial transaction to justify the institution of a proceeding in bankruptcy. It is impossible to draw a line, to say what amount is sufficient to make a preference. This depends upon the character of the payments and the intention of the debtor, and must be determined upon the facts of each particular case.' "

Cases arising under the 1898 Act, which include small claims for current accounts, are not applicable under the 1938 Act.

As shown above, many courts, under the 1898 Act, required the bankrupt to state the nature and respective amounts of his debts and excluded small claims on current accounts. This was the "case law" made prior to the Chandler Act. However, other courts, although lamenting the apparent necessity of including such claims,

nevertheless strictly following the statute, even though confessedly contrary to the spirit of the statute, included them because of the omission in the 1898 Act of any provision expressly requiring their exclusion.

Thus in **Matter of Alden** (D. C. Mass. 1924), 2 Fed. (2d) 61, the court included claims referred to as trivial because it could find no authority for excluding them, saying (l. c. 62):

> "Doubtless it would be convenient to disregard the bills of the butcher, the baker and the candlestick maker as beneath the dignity of the bankruptcy court, but I find in the act no authority for such a course."

In the **Matter of Hall** (D. C. Penn. 1928), 27 Fed. (2d) 999, the court admitted that in including small claims it acted in direct opposition to the spirit of the Act, but could find no authority to justify exclusion. It said (l. c. 1000):

> "In view of the facts developed, we have been somewhat reluctant in arriving at our conclusion that the petition must be dismissed. The dismissal seems to us to be in direct opposition to the spirit of the Bankruptcy Act, which seeks an equitable distribution of an insolvent's estate among his creditors * * * However, it is not our duty to allow the direct letter of the Bankruptcy Act to be overthrown by our conception of the spirit of that Act. Congress, in the exercise of its judgment, has determined that a petition in bankruptcy may be filed by one creditor, where the creditors number less than 12; and it has determined that where the creditors are in excess of 12 in number, 3 creditors must unite in the petition before the petition in bankruptcy is effective. It has not limited the creditors to merchandise creditors, and we find no warrant in law for the rejection of any bona fide provable claim in bankruptcy."

Neither preferred creditors nor small claims for current

accounts were expressly excluded under the 1898 Act. The reasoning which excludes the one, also excludes the other.

In any event, if any legislative expression was necessary, it was supplied by [and for the reasons given by the House Committee on the Judiciary] requiring the bankrupt to file a statement showing the "nature" and "amounts" of his debts. The purpose of this amendment, as stated by the House Committee on the Judiciary, was to adopt the "case made law," which ascertained and excluded debts for current accounts in small amounts.

The report of the Committee on the Judiciary, U. S. House of Representatives, on the Chandler Bill, shows the Committee's intention that creditors with small claims for current accounts should be excluded in computing the number of the bankrupt's creditors and the enactment by the Congress of the bill as recommended, evidences like legislative intention.

In recommending the amendment of Sec. 56c (eliminating claims of $50.00 and under, from count as to numbers at creditors' meeting), the repeal of old Sec. 55d (requiring unanimous consent to call special meeting of creditors), the amendment of 59e (adding 3 additional excluded classes), and the amendment of Sec. 59d (requiring the bankrupt to list the nature and amount of his debts), the Committee stated its intention as follows (**House Committee on the Judiciary, Report No. 1409**, pp. 14, 17, accompanying H. R. 8046 [the Chandler Bill], 75th Cong., 1st Session, July 29, 1937):

> "**Small Claims**—Section 56 c: Under this amendment claims for $50, or less will not be counted in computing the number of creditors voting or present at creditors' meetings, but are to be counted in computing the amounts. The reason for this change is that there are **usually** a large number of creditors with small claims, representing in the aggregate a comparatively small total of the bankrupt's indebted-

ness, which fall into the hands of collection agencies and others by solicitation, **with the result that the holders of such claims, with little at stake, are able to control the administration of the estate and to defeat the interests of the substantial creditors.** The adoption of this amendment will go far toward removing one of the most serious abuses of bankruptcy administration and will deprive the small creditors of no substantial rights. When it is considered that the average dividend in average bankruptcy cases is less than 10 per cent and a dividend on the $50 claim is, therefore, but $5, the justice of this amendment is readily apparent.

* * * * * * *

"**Creditors.**—Section 55 d: **Special meeting—Small claims.**—The present provisions for special meetings of creditors is obsolete and has therefore been eliminated. As already pointed out under 'Claims' above, and for the reasons given, the claims of creditors amounting to $50 or less are not counted in computing the number of creditors, but are counted in determining the amounts.

"**Number of Creditors Joining in Petition.**—Under Section 59e relatives of the bankrupt, persons interested in a bankrupt corporation, creditors who have participated in the act of bankruptcy, fully secured creditors, and creditors who have received void or voidable preferences, liens or transfers, are not included in computing the number of creditors for the purpose of determining how many creditors must join in the petition; **and in Section 59d, where the number of creditors is less than 12, the amendment follows the authorities and is simply declarative of the case made law.**" (Emphasis ours.)

The amendments of Secs. 56c, 55d and 59d [52 Stat. 865, 866, 868, Chap. 575, Secs. 55d, 56c, and 59d, 11 U. S. C. A. 91 (d), 92 (c), 95 (d)] are in pari materia on the point of excluding small claims from computation as to number and are dealt with together. The Committee's intention as to

one amendment is relevant as to the others. The intention as to the amendments of Secs. 56c and 55d is expressly to curtail the power of small claims, and this same intention is expressed as applicable to the amendment of 59d.

The application of the intention of the Committee that small claims for current accounts should not be counted in the computation of creditors under Sec. 59d is made by **Commerce Clearing House** in its **Bankruptcy Law Service, Law Compilation,** 3rd Edition, Par. 5543, p. 4043, as follows:

> "**Small Claimants.**—The new subsection c of section 56 provides that claims of $50 or less are not to be counted in computing the number of creditors voting or present at creditors' meetings but shall be counted in computing the amount. **The reason given for this change was that small claimants with little at stake had been able to control the administration of the estate and defeat the interests of substantial creditors.** It may be that this change will effect a change in the method of computing the number of creditors for the purpose of filing a petition (59d). **At least it would seem to strengthen the position taken by some of the district courts that creditors for trivial amounts, the butcher and the baker, are not to be counted.**" (Emphasis ours.)

The amendment of 59d, the Report of the Committee on the Judiciary states, "follows the authorities and is simply declarative of the **case made law.**" (Emphasis ours.) Under the heading, "Number of Creditors Joining in Petition," and "where the number of creditors is less than 12," the Committee states creditors are to be counted according to "the case made law," and not according to arithmetical units. We have pointed out that the only "case law" made prior to the Chandler Act required the nature and amount to be stated in the bankrupt's list and on the basis of that information excluded small claims for current accounts.

The respective amounts and the nature of the 16 challenged claims require that they be excluded as small claims for current accounts in this case.

The reason Congress did not expressly include small claims for current accounts in the excluding categories of Sec. 59 (e) is obvious. The fixing of a ceiling in amount for purposes of 59 (d) is impractical because the significance of the amount is a relative matter dependent upon many considerations, including the financial status of the bankrupt, his total assets and liabilities and the amount of the claim of the petitioning creditor, and the total number of unsecured claims. A claim for a certain amount might be substantial as against a wage earner with assets of $500.00 and yet the same claim against a large corporation or against an individual with $100,000.00 in assets would be a small claim. Again, if the claim of the petitioning creditor is large, and if the value of the property alleged to have been preferentially or fraudulently transferred is large, the amount of the claims of creditors who may defeat a petition by one creditor should be substantial. It is a relative matter.

In **Security Bank & Trust Co. v. Tarlton** (D. C. Tenn., 1923), 294 Fed. 698, the petition was filed on January 18, 1923, by one creditor with a claim of $50,000.00, and the bankrupt listed 22 unsecured creditors, 14 of which had small accounts for current expenses. The Court said (l. c. 700):

> "**No certain amount could well be established as the maximum which might be claimed as a 'debt' under such circumstances, and the relative rights of the parties must be taken into consideration** in determining the question of the number of creditors. This case falls within the principle which has been announced in (citing authorities) and which is laid down as the rule to be followed in such cases by Collier: 2 Collier on Bankruptcy (13th Ed.), p. 1228 (d).

"It appears from the record that none of the parties other than petitioner is willing to proceed against the defendant in bankruptcy for various reasons, the principal one seeming to be that he has been a good customer, and this case affords a striking illustration of the soundness of the principle above stated for determining who are 'creditors' within the meaning of the Bankruptcy Act. To hold otherwise would be to say that defendant, with many thousands of dollars of valuable property as disclosed by the record, could so transfer his property as to secure his favored few, leave a few small and comparatively insignificant claims due certain of his friends, who, for the amount involved, would not be willing to institute or join in bankruptcy proceedings, and thus leave plaintiff with his large indebtedness wholly without remedy (assuming that no fraud entered into the transfers made by defendant to those whose debts he attempted to secure, and no fraud appears from the record as now presented). Plaintiff would thus be without remedy. Justice never contemplated that such an advantage should be given, nor does the law permit it." (Emphasis ours.)

The Court of Appeals in **Houchin Sales Co. v. Angert** (C. C. A. 8th, 1926), 11 Fed. (2d) 115, l. c. 117, said:

"The nature of the business transacted and the facts and circumstances of each particular case are important to be considered in determining such question."

There was really no necessity for the Act of 1938, under which this case arises, to expressly include small current accounts in the excluding categories in Sec. 59 (e), because such claims had previously been excluded under the "De minimis" rule, and as being practically secured.

Current accounts for ordinary living expenses are customarily paid monthly. They vary in amount according to the economic or financial status of the debtor. They rarely appear in any schedules, except of debtors in the lower financial brackets.

The respondent lists his assets at $278,500.00. He has passed the quarter-million dollar station in life. These 16 small creditors living about him in Chillicothe hold current accounts for living expenses. He had customarily paid them monthly as is evidenced by the fact that practically all these unpaid bills are July, 1944, bills. They were not due and payable till after the petition was filed. For all intents and purposes they are secured creditors, expressly excluded under Sec. 59 (e) (4). Of course, they would never join in an involuntary petition in bankruptcy.

Sec. 59 (b) expressly gives a single creditor the right to file a petition, if the creditors are less than 12. If such creditors as these are to be counted, then obviously Sec. 59 (b) grants an illusory and not a substantial right. It is made illusory by the fact recognized by the House Committee on the Judiciary (**House Committee on the Judiciary, Report No. 1409**, p. 14, accompanying H. R. 8046 [Chandler Bill], 75th Congress, 1st Session, July 29, 1937), "that there are **usually** a large number of creditors with small claims, representing in the aggregate a comparatively small total of the bankrupt's indebtedness, * * *." (Emphasis ours.)

The holding by the Court of Appeals that the respondent's small-claim creditors for current accounts should be counted, thereby preventing the Committee from maintaining this proceeding, and permitting the bankrupt, as here, to use the holders of small claims for current accounts with little at stake to defeat the interest of a substantial creditor, is erroneous on the ground that it violates, if not the letter, certainly the spirit of the 1938 Amendment (Chandler Act).

There are "**usually**" a large number of creditors with small claims for current accounts. This fact was recognized and stated by the House Committee on the Judiciary as we have heretofore pointed out. It follows, if the Bank-

rupt's small-claim creditors for current accounts are to be counted, that the bankrupt **usually** would enjoy complete immunity to an involuntary bankruptcy petition filed by a single creditor.

The rule of statutory construction according to the spirit of the Chandler Act is important here, where otherwise absurdity or injustice would result. In **Fleischmann Construction Co. v. United States** (1926), 270 U. S. 349, l. c. 360, 46 S. Ct. 284, l. c. 289, 70 L. Ed. 624, l. c. 631, this Court said: "The strict letter of an Act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress. * * * And unjust or absurd consequences are, if possible, to be avoided"; in **Holy Trinity Church v. United States** (1892), 143 U. S. 457, l. c. 459, 12 S. Ct. 511, 36 L. Ed. 226, l. c. 228, this Court said: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has often been asserted, and the reports are full of cases illustrating its application"; in **Stevens v. Nave-McCord Mercantile Co.** (C. C. A. 8th, 1906), 150 Fed. 71, l. c. 75, supra, the Court of Appeals said: "* * * the statute must be given a rational, sensible construction; * * *"; and in **59 C. J., Statutes 964, Sec. 573,** the rule is thus stated: "In pursuance of the general object of giving effect to the intention of the legislature, the courts are not controlled by the literal meaning of the language of the statute, but the spirit or intention of the law prevails over the letter thereof, it being generally recognized that whatever is within the spirit of the statute is within the statute, although it is not within the letter thereof, while that which is within the letter, although not within the spirit, is not within the statute. Effect will be given the real intention even though contrary to the letter of the law."

II.

QUESTION ONE, POINT II.

Small claims are not to be included under the rule, "Expressio unius est exclusio alterius," because not included in Sec. 59 (e). The contrary holding of the Court of Appeals is in conflict with decisions of the First and Tenth Circuits on the same matter.

The Act of 1898 [30 Stat. 561, 562, Chap. 541, Sec. 59 (e), 11 U. S. C. A., Sec. 95 (e)], in the computation of the number of the bankrupt's creditors, expressly excluded [Sec. 59 (e)] only: 1) Employees of the bankrupt, and 2) relatives of the bankrupt. The Chandler Act of 1938 [52 Stat. 868, 869, Chap. 575, Sec. 59 (e), 11 U. S. C. A., Sec. 95 (e)], added 3 additional excluded classes: 3) Creditors who participated in the alleged acts of bankruptcy, 4) secured creditors, and 5) preferred creditors.

Before the additional 3 excluded classes were expressly added in 1938 [Chandler Act of 1938, Sec. 59 (e), 11 U. S. C. A., Sec. 95 (e)], it was argued that since the Act of 1898 expressly excluded only the 2 classes, no other classes could be excluded under the rule of "Expressio unius est exclusio alterius." However, other Circuit Courts of Appeals, prior to the 1938 Act, excluded other classes, because of the manifest unfairness to the petitioning creditor resulting from their inclusion, and refused to apply the maxim. It was so held in the following cases:

Myron M. Navison Shoe Co., Inc., v. Lane Shoe Co. (C. C. A. 1st, 1929), 36 Fed. (2d) 454, l. c. 457;
International Shoe Co. v. Smith-Cole, Inc. (C. C. A. 10th, 1933), 62 Fed. (2d) 972, l. c. 974;
Leighton v. Kennedy (C. C. A. 1st, 1904), 129 Fed. 737, l. c. 739.

III.

QUESTION ONE, POINT III.

The decision of the Court of Appeals including in the count unsubstantial claims is in conflict with the First Circuit Court of Appeals on the same matter in Leighton v. Kennedy (1st C. C. A., 1904), 129 Fed. 737, l. c. 740.

In the Leighton case, supra, the First Circuit, referring to "Eight claims against said Leighton, aggregating less than $200.00" (l. c. 739), held that such claims "were unsubstantial, and not cognizable in bankruptcy proceedings, which, as we have several times held, are governed by equitable principles" (l. c. 740).

IV.

QUESTION ONE, POINT IV.

Proper administration of the Bankruptcy Act warrants this Court in settling this important question.

The institution of unauthorized proceedings should be avoided. A creditor should know whether he alone may institute a proceeding or whether two other creditors must join with him. Until the creditor knows whether his debtor's small-current-account creditors are to be counted he, in a case where the debtor has few creditors, can not determine whether he alone can maintain the proceeding. If holders of these claims described by the Referee (R. 54) as "similar to the usual monthly bills that any head of a family would normally incur" are to be counted, then whether the total is less than 12 becomes useless, a count of creditors becomes futile, and the exclusion of employees and relatives becomes fruitless. In a count, why bother to exclude the participants in the acts of bankruptcy if the barber's current bill for $10.00 and the grocer's for $6.00 are to be included? The exclusion of

preferred creditors and secured creditors is nullified by the inclusion of the current telephone and dry cleaning bills. The right given a sole creditor in Sec. 59 (b), the elaborate procedure set up in Sec. 59 (d) for determining the total number of creditors, and the well-founded exclusions enumerated in Sec. 59 (e) are not to be frittered away by including small current accounts "that any head of a family would normally incur." Such claims are too small for the law's protection. They are for all intents and purposes secured claims excluded under Sec. 59 (e) (4). The spirit of the Chandler Act forbids their inclusion.

Until this Court settles this question the right of a sole petitioner under Sec. 59 (b) is fraught with such peril from these small-current-account creditors **"usually"** present as to be practically unavailable, and the counting of creditors under 59 (d) and (e) is futile.

B. ARGUMENT AS TO SECOND QUESTION PRESENTED.

QUESTION TWO, POINT I.

Respondent Was Fraudulent to Interveners in Accepting Money for a Non-Existent Contract.

(a) **Respondent's fraudulent conduct.**

Respondent's fraud went to the substance of the transaction, as pointed out above in our statement of the case, and because of that, interveners are entitled to restitution as in all other cases where a person pays money in misreliance upon the existence of a valid contract. This is not a case where there is a mere misrepresentation as to the price which the principal would be willing to take, although respondent did make a misrepresentation as to such price. It is similar to the case of **McClure v. H. R. Ennis R. E. & Inv. Co.** (1925), 219 Mo. App. 112, 268 S. W. 675, where the name of a straw buyer was inserted

by the agent in place of the real seller and where the court held that irrespective of other issues and irrespective of loss to the purchaser, the latter was entitled to the return of the deposit which he had made. The Court said (219 Mo. App., l. c. 120) that the misrepresentations were "the very foundation of the action. Can we say, then, that these representations, if proved, were immaterial? We think not." As in that case, there is no possibility of dealing with respondent's misrepresentation as mere sellers' talk.

Even in cases where the agent has misrepresented the price which the principal is willing to receive, the better reasoned cases and more importantly, the Supreme Court of Missouri, hold that such statements are not merely sellers' talk but are actionable misrepresentations for which the agent is liable to the buyer. We will deal with these cases, not because we believe they are determinative but because we believe that even in such cases the weight of authority is strongly in favor of allowing recovery by the third person.

We mention first what we regard as the determinative case because it was decided by the Supreme Court of Missouri, where the transaction occurred.

In **Hays v. Smith**, 213 S. W. 451 (Mo. Supreme Court, 1919), the question raised was whether the statement by the agent as to the seller's price was made with or without the knowledge of the seller. It was alleged that the agent had stated the seller's price to be $75.00 per acre, when in fact it was $50.00 per acre, as the agent knew. The question was whether the judge was correct in stating that the issue was whether the agent had represented the price fixed by the principal at $75.00 per acre "with the knowledge and consent of" the principal. The Court held that this was the important issue since it would determine whether or not the agent was guilty of deceit. This case holds that an agent's misrepresentations as to price with-

out the knowledge and consent of the seller are actionable. This case overrules in substance the previous Missouri Appeals case of **McLennan v. Investment Exchange Company** (1913), 170 Mo. App. 389, 156 S. W. 730, a case which was also in part erroneously decided on the ground that the fraudulent agent is not liable to a third person. This latter point has been decided adversely to the **McLennan** case in **Hack v. Crain** (Mo. Sup. 1915), 177 S. W. 587, which has universal support.

The Missouri rule is supported by a long line of authority: **Lear v. Bawden** (1924), 75 Colo. 385, 387, 225 Pac. 831 (the agent was held liable for a simple misrepresentation as to the principal's asking price); **Bigger v. Hollworth** (1921), 69 Colo. 451, 194 Pac. 940; **Dunshee v. Novotny** (1925), 77 Colo. 6, 233 Pac. 1114; **Kilgore v. Bruce** (1896), 166 Mass. 136, 138, 44 N. E. 108, 109 (not directly in point but a case where the fact that the subject matter was worth the price paid, held not to exonerate the agent); **Isenbeck v. Burroughs** (1914), 217 Mass. 537, 539, 105 N. E. 595, 596 (where the agent misrepresented the seller's lowest price, the Court held that the agent was liable to the purchaser for the difference between the seller's price and the price the agent represented); **Hokanson v. Oatman** (1911), 165 Mich. 512, 517, 131 N. W. 111, 113 (where the buyer was allowed an action for the difference in price between the amount stated by the agent and the amount specified by the principal); **Stevens v. Reilly** (1916), 56 Okla. 455, 462, 156 Pac. 157, 159 (a similar result, the Court allowing recovery for the difference between the price specified and that represented by the agent); **Cook v. Skinner** (1908), 50 Wash. 317, 319, 97 Pac. 234, 235 (another case of assumpsit where the agent was made to surrender to the purchaser the amount he had profited from the fraud); **Collins v. Philadelphia Oil Co.** (1924), 97 W. Va. 464, 470, 125 S. E. 223, 225 (where the Court

vigorously denied that the doctrine of caveat emptor should shield an agent who had defrauded a buyer by misrepresenting the seller's asking price; the Court said [97 W. Va., l. c. 469]: "We do not consider that the doctrine of caveat emptor either now or ever has been a complete shield to all sorts of false bargaining"); and **Estes v. Crosby** (1920), 171 Wis. 73, 79, 175 N. W. 933, 935 (representing settled Wisconsin view as brought out in the next two cases); **Booker v. Pelkey** (1920), 173 Wis. 24, 180 N. W. 132; and **Rimling v. Scherper** (1932), 206 Wis. 532, 240 N. W. 159. See, also, **2 Restatement of the Law of Agency,** Sec. 348, Comment (d), p. 763, and **Reporter's Notes, Appendix to Tentative Draft No. 6, Restatement of Agency,** pp. 195-197, incl.

There was no contract.

Since the intervener's offer was not communicated, of course it could not have been accepted and it was not accepted. An intentionally different purported offer was presented by respondent to the Committee and this was accepted by it in the mistaken belief that it was a real offer.

This represents the type of case where the minds of the parties have not met and where it is universally held that there is no contract.

A case involving substantially the same issue is that of **Vickrey v. Ritchie** (1909), 202 Mass. 247, 88 N. E. 835. Here in a building contract the architect presented to the contractor a document signed by the landowner in which the price appeared as $33,731. He presented to the landowner a document signed by the contractor in which the price appeared as $23,200. The fraud was not discovered until the building was nearly completed. The Court held (202 Mass., l. c. 249, 250): "The plaintiff and defendant were mistaken in supposing that they had made a binding

contract for the construction of this building. Their minds never met in any agreement about the price. * * * Their mutual mistake in this particular left them with no express contract by which their rights and liabilities could be determined. * * * Through the mistake of both parties there was no agreement, and that which was thought to be a valuable consideration failed." The Court refused to allow an action on the contract, but permitted one of quasi contract because of the unjust enrichment which would result if the owner of the land were not required to pay for the value of the building erected upon it. See, also, **Dock Contractor Co. v. Niagara Falls Power Co.** (D. C. N. Y., 1921), 274 Fed. 852, l. c. 855.

This is universal law.

McClure v. H. R. Ennis R. E. & Inv. Co. (1925), 219 Mo. App. 112, 268 S. W. 675. Here a contract as signed by the plaintiff to purchase from J. Q. Watkins was changed to one in which the sellers appeared to be Watkins and Harner. The Court held (219 Mo. App., l. c. 120): "On the question of alterations in the contract we hold that defendant's contention that, since said changes were in plaintiff's favor there could be no valid objection to them, is untenable. * * * It was held by the Supreme Court in Carson v. Woods, 177 S. W. 623: "The smallest material change in a written instrument will invalidate it, without regard to the intent with which the change is made."

See also: **Nelson v. Rohweder** (1920), 147 Minn. 325, l. c. 328, 180 N. W. 223, l. c. 225.

In 6 **Williston on Contracts** (Revised Edition, 1938), p. 5352, Sec. 1913, the author states:

> "In some cases, however, a writing is altered before it has become a binding contract by delivery or assent. * * * the * * * question may arise in any case where a writing is intrusted to an agent to deliver and it is altered before delivery. * * * so long as it

(the alteration) is material, a non-assenting obligor cannot be held. **He cannot be held on the obligation in its altered form, because he never made or assented to such an obligation. He cannot be held on the obligation in its original form, because that obligation was never delivered or assented to by the creditor.**" (Emphasis ours.)

See, also, 2 **C. J., Alteration of Instruments**, 1224, Sec. 91, where the rule is stated:

"But where an instrument has been signed by one party with the understanding that the other party is also to sign it, and it is materially altered and signed by the latter in its altered form, it does not become binding on the one who first signed it * * *."

The spurious contracts were void on the ground of forgery. 2 **C. J. S., Agency**, Sec. 37, p. 1076; **Broughton Bros. v. Sumner** (1899), 80 Mo. App. 386, l. c. 388; **Kelchner v. Morris** (1898), 75 Mo. App. 588, l. c. 593; **Ferry v. Taylor** (1863), 33 Mo. 323, l. c. 334.

The Fact That Respondent Became Subject to Liability for a Breach of Fiduciary Duty to His Principal and Was Still Liable to His Principal for Such Breach, Does Not Make Him Less Liable to the Interveners.

That a fraudulent person cannot be relieved from liability because he is responsible to some one else for his fraud is obvious, and the courts have consistently held that an agent who is personally fraudulent in the acquisition of money, whether or not for his own or for his principal's benefit, is liable to the person from whom he obtained it, whether or not he has paid over to the principal the amount that he improperly received.

In **Hack v. Crain** (Mo. Sup., 1915), 177 S. W. 587, Crain,

the defendant, a real estate broker, engaged by one Goodspeed to sell the latter's land at $1600, falsely represented to Hack, the plaintiff, that the land was worth $900 in excess of the vendor's sale price, and induced plaintiff to buy at such price of $2500, pocketing the $900 difference. The plaintiff's action was in equity, not "in tort for fraud or deceit." The defendant's defense was an attempted application of the agency-accounting rule (identically the same as actually applied here by the Court of Appeals), namely, because the dishonest agent was "bound to account" to his principal "for all that he had actually obtained" from the purchaser, the defrauded purchaser had no right of action for the excess amount fraudulently extracted by the agent. The Missouri Supreme Court held the agency-accounting rule inapplicable, and the defense based thereon without merit. It held the agent was guilty of fraud, **actionable in equity**, and plaintiff was decreed recovery of the excess amount of $900 from the defendant, **notwithstanding that the defendant sold the land in the capacity of an agent.** The decree cancelled a $500 balance on a mortgage note, and gave a money judgment for $400, aggregating the $900 extortion.

The decision is on all fours and applicable here and the decision of the Court of Appeals is squarely in conflict therewith. The Court said (l. c. 589):

> "Counsel for defendant insist that, under the pleadings and evidence in this case, the defendant was the agent of Goodspeed, the vendor of the land, and not that of the plaintiff, the vendee, in the sale thereof, and consequently whatever fraud was perpetrated by him in the transaction was to the damage of the former, and not to the defendant, the vendee, and therefore plaintiff was not entitled to the relief prayed for in this bill.
>
> "In our opinion, Counsel for the defendant has clearly misconceived the character of the cause of

action charged in the bill. * * * The petition proceeds upon the theory that plaintiff was ignorant of the character of the soil and the value of the land purchased, and that defendant knew those facts, and that, after plaintiff informed defendant thereof and told him that he was going to rely upon his judgment as to the character and value of the land, then, under the facts and circumstances stated in the petition, which were fully proven by the evidence, the conduct of the defendant clearly constituted such a deception and fraud upon the plaintiff as to entitle him to the relief prayed, **regardless of the question as to whether or not he had also perpetrated a fraud upon the vendor of the land.**" (Emphasis ours.)

In **Patzman v. Howey**, 340 Mo. 11, 22, 100 S. W. (2d) 851, 856, the controlling local rule is thus stated:

> "'When an officer or agent of a corporation by fraud procures the money of a third person while acting for the corporation, he cannot escape liability therefor by paying over the money to the corporation.' [7 R. C. L. 507, Sec. 489; Bank of Atchison Co. v. Byers, 139 Mo. 627, 41 S. W. 325; Hoffman v. Toft (Ore.), 142 Pac. 365, 52 L. R. A. (N. S.) 944, Ann. Cas. 1912 D, 721, note.]"

To the same effect, **Tillman v. Bungenstock** (1914), 185 Mo. A. 66, l. c. 68, 171 S. W. 938, l. c. 939.

The rule is supported by a long line of authority: **Bocchino v. Cook** (1902), 67 N. J. L. 467, 468, 51 Atl. 487; **Phetteplace v. Bucklin** (1893), 18 R. I. 297, 300, 27 Atl. 211, 212; **Moore v. Shields** (1889), 121 Ind. 267, 273, 23 N. E. 89, 91; **Hardy v. American Export Co.** (1902), 182 Mass. 328, 329, 65 N. E. 375, 376, 59 L. R. A. 731, 732; **Alexander v. Coyne** (1915), 143 Ga. 696, 698, 85 S. E. 831, 832, L. R. A. 1916 D, 1039, 1041, and **Hoining v. Federal Reserve Bank** (C. C. A. 8th, 1931), 52 Fed. (2d) 382, 387, 82 A. L. R. 297.

In **3 C. J. S., Agency**, page 129, Sec. 220, it is said: "An agent's liability for his own tortious acts is unaffected by the fact that he acted in his representative capacity or by authority or direction of another, and whether acting for himself or on behalf of another, he is personally liable for torts committed by him." This is universally accepted. See **2 Restatement of Law of Agency**, Sec. 348, p. 760, and cases cited in **Note in 82 A. L. R. 312** (1933).

In **Peterson v. McManus** (1919), 187 Ia. 522, l. c. 547, 172 N. W. 460, l. c. 469, where the plaintiff sought to recover property obtained by a fraudulent agent and transferred to his principal, it is stated: "If his (the agent's) fraud deprived the plaintiff of property, that fact alone supports a judgment that McManus (the agent) restore the property." In **Inland Waterways Corp. v. Hardee** (App's. Dis't. Col. 1938), 100 Fed. (2d) 678, l. c. 685, the Court in imposing liability upon the agent which had improperly received money for his principal, even though he had turned the money over to the principal, in this case the United States, stated: "An agent is not excused from liability for his torts because he acted only as an agent, whoever his principal may be."

Interveners Have Alternative Rights to Sue in Tort or in Quasi Contract. This Proceeding Is for the Enforcement of the Quasi Contractual Claim and Not a Claim for Tort Damages.

The distinction between an action of tort and an action of quasi contract or its modern name, an action of restitution, is well defined. The action of quasi contract is based upon the unjust enrichment which occurs when a person has improperly received property or money from another and is not entitled to retain it. Plaintiff has alternative remedies either to sue for the wrong that has been done him or to require what in substance amounts to

a rescission of the transaction by getting back from the tortfeasor the amount by which the tortfeasor has been benefited by his tort. The plaintiff is not seeking damages for the wrong and is not allowed to recover damages merely because he has been injured. He is allowed to recover the amount by which the tortfeasor has been enriched. See **Restatement of Restitution, Introductory Note to Chapter 7, page 522.**

This alternative action has been recognized where an agent has misrepresented the amount which his principal would take and where the Court has allowed recovery for the amount improperly received by the agent. This was true in **McClure v. H. R. Ennis R. E. Inv. Co.** (1925), 219 Mo. App. 112, 268 S. W. 675; in **Isenbeck v. Burroughs** (1914), 217 Mass. 537, 105 N. E. 595; **Hokanson v. Oatman** (1911), 165 Mich. 512, 131 N. W. 111; and **Cook v. Skinner** (1908), 50 Wash. 317, 97 Pac. 234. This alternative action has also been recognized in the line of decisions of this Court headed by **Crawford v. Burke** (1904), 195 U. S. 176, 25 S. Ct. 9, 49 L. Ed. 147, which hold that such a debt is provable against the bankrupt's estate, though the creditor never elects to waive the tort.

In **Clifford Banking Co. v. Donovan Commission Co.** (1906), 195 Mo. 262, 288, 94 S. W. 527, 535, the Court held:

> "The action for money had and received has always been one favored in the law and the tendency is to widen its scope—it being a flexible form of action, levying tribute in equitable, as well as strictly legal doctrines; so that it has become axiomatic that the action lies where 'the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff.'
>
> "On principle there is no reason apparent to us why a constructive trust in favor of respondent does

not exist in this case under the rule announced by Mr. Perry (1 Perry on Trusts [5 Ed.], Sec. 211), as follows: 'So property obtained by one through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded, though the person receiving the benefit is innocent of collusion. If such person accepts the property, he adopts the means by which it was procured; or, as Lord Ch. Justice Wilmot said, "Let the hand receiving the gift be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it"' "

* * * * * * *

"Nor can we see any good reason why in this form of action, where the petition partakes of the nature of a bill of equity, the action may not lie to reach money held under a constructive trust." (Emphasis ours.)

In **Restatement, Restitution**, 673, Sec. 166, the applicable general rule is thus stated:

"Where one person acquires title to chattels or to money from another by fraud, he holds the chattels or money upon a constructive trust for the defrauded person. * * * Whether or not the chattels or money are still held by the wrongdoer, **the defrauded person can maintain against the wrongdoer a quasi-contractual action** (see Sec. 130) or an action of tort for deceit or for conversion." (Emphasis ours.)

Also supporting the rule are **Hack v. Crain** (Mo. Sup., 1915), 177 S. W. 587, 589, and **Webster v. Sterling Finance Co.**, 351 Mo. 754, 757, 173 S. W. (2d) 928, 931.

The Basis of Quasi Contractual Relief Is the Amount of Unjust Enrichment.

The difference between an action of tort, where the accent is upon the damage suffered by the defendant, and the action for restitution, where the accent is upon the

amount improperly received, is crucial in this action. This proceeding was not brought for the damage which interveners have suffered but the amount by which the respondent has been unjustly enriched. In these proceedings it is, therefore, not essential that the interveners should establish that they have suffered financial loss. It is sufficient that the respondent has received their money, to which because of his fraud, he was not entitled. This point of view is perhaps best expressed in the case of **Federal Sugar Refining Co. v. United States Sugar Equalization Board, Inc.** (S. D. N. Y. 1920), 268 Fed. 575, where the action was for wrongful interference by the defendant with the plaintiff's contract with the Norwegian Government. The defendant had made a similar contract with the Norwegian Government and had acquired a large profit thereby. The defendant complained that the plaintiff had not proved damage but the court, recognizing that the plaintiff had "waived the tort" and was suing in assumpsit for money had and received, permitted recovery by the plaintiff, stating (l. c. 582, 583): "The point is not whether a definite something has been taken away from plaintiff and added to the treasury of defendant. The point is whether defendant unjustly enriched itself by doing a wrong to plaintiff in such manner and in such circumstances that in equity and good conscience defendant should not be permitted to retain that by which it has been enriched. * * * It is further urged that, unless plaintiff has been actually damaged, it has no grievance, and that the complaint should have alleged ability profitably to perform plaintiff's contract with the Norwegian Commission. This position misconceives the nature of an action for money had and received as framed in this complaint. * * * The action is not for damages for breach of contract, but for the profit which defendant is alleged to have made as the result of its alleged wrongful acts. Ability to perform, in such circumstances, is no part of

plaintiff's case. **Angle** case, supra, 151 U. S. 12, 14 S. Ct. 240, 38 L. Ed. 55."

For other cases which recognize this point of view see **Caskie v. Philadelphia Rapid Transit Company** (1936), 321 Pa. 157, 184 Atl. 17, 106 A. L. R. 318, where the Court stated [321 Pa., l. c. 163]: "Recovery has not been limited to cases in which something has been taken from plaintiff's pocket"; and **Second National Bank of Toledo v. M. Samuel & Sons** (C. C. A. 2d Cir., 1926), 12 Fed. (2d) 963, 53 A. L. R. 49, where the Court held that defendant had received a benefit which it was unjust for him to retain, and this benefit, on account of the tort which defendant had committed, should be paid to the plaintiff who was in equity entitled to it. The Court deemed it unnecessary to consider either whether the benefit was derived at the plaintiff's expense, or the fact that the plaintiff had complete indemnification by contract action against either the bank issuing the letter of credit or the vendor who had transferred the draft. See, also, "Diminution of Plaintiff's Estate as an Essential of Unjust Enrichment in an Action at Law" in 22 **Virginia Law Review**, page 683, et seq.

The rule that one who has been unjustly enriched is responsible to another from whom he has improperly obtained property is brought out in a wide variety of cases. See **Thurston, Cases on Restitution** (1940), footnotes on pp. 77, 78, 79, 82, 83. This is particularly clear in cases where one who is not entitled to receive payment on a debt is sued by the obligee, in which case the one so receiving the money is liable to the rightful owner of the claim, although the latter still has his claim against the obligor. For this see **Heywood v. Northern Assurance Co.** (1916), 133 Minn. 360, 158 N. W. 632, Ann. Cas. 1918 D, 241; **Bates-Farley Sav. Bank v. Dismukes** (1899), 107 Ga. 212, 33 S. E. 175; and **Bosworth v. Wolfe** (1928), 146 Wash. 615, 264 Pac. 413, 56 A. L. R. 1117. The same principle

is applied to patent infringement cases where the recovery is based not upon the harm to the plaintiff by the infringement of the patent but the profits received by the infringer. See **Duplate Corp. v. Triplex Safety Glass Co.** (1936), 298 U. S. 448, l. c. 457, 56 S. Ct. 792, l. c. 796, 80 L. Ed. 1274, l. c. 1281, where this Court held, "The wrongdoer must yield the gains begotten of his wrong." See, also, **Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.** (1916), 240 U. S. 251, l. c. 259, 36 S. Ct. 269, l. c. 272, 60 L. Ed. 629, l. c. 634 (infringement of trade-mark), where this Court held, "* * * profits are * * * allowed as an equitable measure of compensation, on the theory of a trust ex maleficio."

In **First National Bank v. Produce Exchange Bank** (1935), 338 Mo. 91, 98, 99, 89 S. W. (2d) 33, 38, the plaintiff sued a collecting bank in an action for money had and received for the value of cashier's checks collected on forged endorsements. Recovery was allowed notwithstanding the plaintiff was reimbursed for its loss by an insurance company. The Court said:

> "In next to the last paragraph of the opinion filed we intended to answer the question, Can plaintiff recover, not having pleaded nor shown any loss? by adopting what Judge Trimble said on this question in his dissenting opinion, but, perhaps, we did not make ourselves clear. In addition to what we quoted, which we think is pertinent, Judge Trimble, in his dissenting opinion [227 Mo. App. 908, 59 S. W. (2d) 81, page 87] said: 'It is urged that plaintiff cannot recover because it has "suffered no loss." * * * **The suit is not one for damages but to recover money the defendant bank had and received**, but to which it never had title and for which it gave plaintiff no consideration. The plaintiff, the moment it paid out the money on the forged indorsements, had a cause of action against defendant, which arose immediately. **The suit**

is to recover the money, and is not dependent upon whether a loss will eventually accrue to plaintiff, * * *.'" (Emphasis ours.)

II.

QUESTION TWO, POINT II.

In Holding That Interveners May Not Elect to Claim for Money Had and Received—Under the Implied Contract Clause of Section 63 (a) (4) of the Bankruptcy Act—the Court of Appeals Has Rendered a Decision in Conflict With the Decision of Another Circuit Court of Appeals and With an Applicable Decision of This Court on the Same Matter.

In **In re International Match Corp.** (C. C. A. 2d, 1934), 69 Fed. (2d) 73, the proof of claim was in quasi contract, and its gravamen was that the bankrupt had wrongfully pledged stock of the appellant, Swedish Match Co. It appeared that appellant had brought suit in a state court against the pledgee and others claiming damages for conversion of the stock. The Referee expunged the claim on the motion of the trustee in bankruptcy, Irving Trust Co., which order was confirmed by the District Court. The Court of Appeals of the Second Circuit held the claim allowable as a valid claim in quasi contract for unjust enrichment. It said (l. c. 75):

> "The trustee argues that the pendency of the state suit for conversion is a bar to proving in bankruptcy on the theory of quasi contract; that without waiver of the tort no provable claim can arise. Upon this ground the court below held the claim nonprovable. As we read the Supreme Court decisions, the claimant in bankruptcy is not forbidden to take inconsistent positions. Although he has sued in tort for conversion, he has a claim provable and hence dischargeable in bankruptcy (Crawford v. Burke, 195 U. S. 176, 193,

25 S. Ct. 9, 49 L. Ed. 147); and although he has proved in bankruptcy on the implied contract, he may later sue for fraud, an even more obvious inconsistency (Friend v. Talcott, 228 U. S. 27, 37-39, 33 S. Ct. 505, 57 L. Ed. 718). See, also, In re Menzin, 238 F. 773 (C. C. A. 2). As we understand the law, the doctrine of election of remedies between tort and quasi contract has no application to proofs of claim in bankruptcy. **If the facts show an unjust enrichment of the bankrupt, the claim is provable,** even though a prior suit for conversion is pending. Crawford v. Burke, supra." (Emphasis ours.)

In **Crawford v. Burke** (1904), 195 U. S. 176, 25 S. Ct. 9, 49 L. Ed. 147, the Court held that such a debt is provable against the bankrupt's estate, though the creditor **never** elects to waive the tort. This was an action for trover instituted in the Circuit Court of Cook County, Illinois, by Burke against Crawford and Valentine, plaintiffs in error, to recover damages for the wilful and fraudulent conversion of the interests of the plaintiff in certain shares of stock. There were ten counts in the declaration, five charging fraudulent conversion of that stock, and five the obtaining of money from plaintiff in the way of margins by means of false and fraudulent representations. Defendants pleaded their discharge in bankruptcy, but were found liable on all the counts, and judgment was entered against them, which was affirmed by the Appellate Court and by the Supreme Court of Illinois. In reversing the State courts and holding that plaintiff's claim was discharged because it was "provable under the Bankruptcy Act," that is, it was "**susceptible of being proved**" (195 U. S., l. c. 186) under Section 63a as "founded upon * * * a contract express or implied," the Court said (195 U. S., l. c. 193, 194):

"If no fraud could be made the basis of a provable debt, why were certain frauds excepted from the oper-

ation of a discharge? We are, therefore, of opinion that if a debt originates or is 'founded upon an open account or upon a contract, express or implied,' it is provable against the bankrupt's estate * * *. It certainly would not have been the intention of Congress to extend the operation of the discharge under Section 17 to debts that were not provable under Section 63a.

"For reasons above given, we do not think that his election to sue in tort deprived his debt of its provable character, and that as there is no evidence that the frauds perpetrated by the defendants were committed by them in an official or fiduciary capacity, plaintiff's claim against them was discharged by the proceedings in bankruptcy."

III.

QUESTION TWO, POINT III.

Where, as Here, Respondent Was the Sole Actor, the Committee Could Claim Title to the Unjust Enrichment Extracted From the Interveners Only by Virtue of the Sole Actor's Fraud Upon Them, and Had the Agent Accounted to the Committee for the Money, It Would Have Come to the Committee Burdened With Respondent's Knowledge of the Defect in Title. The Court of Appeals in Holding to the Contrary Has Rendered a Decision in Conflict With the Decisions of the 2nd, 5th, 7th and 10th Circuit Courts of Appeals, With Applicable Decisions of This Court, and With Applicable Local Decision, on the Same Matter.

In **Munroe v. Harriman** (C. C. A. 2nd, 1936), 85 Fed. (2d) 493, 495, 111 A. L. R. 657, Plaintiff brought a bill in equity to rescind a loan of securities by him to Joseph W. Harriman and to recover the securities from Harriman National Bank and Trust Co., to which Harriman had pledged them. The lending of the securities was procured

by fraud, which concededly gave ground for rescission of the transaction as against Harriman. The question was whether Harriman's knowledge of his fraud upon Munroe, the plaintiff, and of the latter's resulting equitable claim to recover possession of the borrowed stock, was, as a matter of law, imputed to the bank, when it accepted the pledge of the stock from Harriman's dummy corporation.

The Court said:

> "The rules for determining when an agent's knowledge will or will not be imputed to his principal are frequently stated in terms of presumptions. Thus, in Distilled Spirits, 11 Wall. 356, 367, 20 L. Ed. 167, Justice Bradley said that it is the agent's duty to communicate the knowledge he has concerning the subject of negotiation and there is a presumption that he will perform that duty. * * * The rational explanation of the Distilled Spirits case is that common justice requires that one who puts forward an agent to do his business should not escape the consequences of notice to, or knowledge of, his agent. * * * But the general rule is subject to equally well established exceptions * * *, one of which is that an agent's knowledge is not imputed when he is acting adversely to his principal * * *. The real basis for this exception was stated by Judge Taft in Thompson-Houston Electric Co. v. Capital Electric Co., 65 F. 341, 343 (C. C. A. 6): 'The truth is that where an agent, though ostensibly acting in the business of the principal, is really committing a fraud, for his own benefit, he is acting outside of the scope of his agency, and it would therefore be most unjust to charge the principal with knowledge of it.' **But the injustice disappears if the principal adopts the unauthorized act of his agent in order to retain a benefit for himself.** Thus in Curtis, Collins & Holbrook Co. v. United States, 262 U. S. 215, 43 S. Ct. 570, 67 L. Ed. 956, an agent employed to procure title to land, contrary to instructions procured it with knowledge of a fraud practiced on the

owner. Although the agent had an interest adverse to his principal to conceal the defect in title because his own profits would increase with the number of titles procured, his knowledge was imputed to the principal. He was the sole actor for the corporate principal in procuring the fraudulent patents. **In such a case the principal is impaled on the horns of a dilemma. If he disclaims the agent's acceptance of the property for him as unauthorized, he has no ground to retain it; on the other hand, if he retains the property, he adopts the agent's act in procuring it and must in fairness take the accompanying burden of the agent's knowledge.** See Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 634, 20 S. Ct. 498, 44 L. Ed. 611; * * *.

* * * * * * *

"In such case, as already pointed out, the corporation can claim title only by virtue of the sole actor's act and must accept it burdened with his knowledge of the defect in title.

"It would prolong this opinion unduly to discuss all of the cases cited by opposing counsel. It may be admitted that they cannot all be reconciled, but **there is substantial authority in support of the 'sole actor' doctrine. For reasons already stated we think it is sound.**" (Emphasis ours.)

The decision of the Court of Appeals that the principal is entitled to the proceeds of the fraud perpetrated by respondent on the interveners is also in conflict with the following decisions of the Fifth, Seventh and Tenth Circuit Courts of Appeals on the same matter:

Connecticut Fire Ins. Co. v. Commercial Nat. Bank (C. C. A. 5th, 1937), 87 Fed. (2d) 968, 969;

Bosworth v. Maryland Casualty Co. (C. C. A. 7th, 1935), 74 Fed. (2d) 519;

Queenan v. Mays (C. C. A. 10th, 1937), 90 Fed. (2d) 525, 530.

The decision of the Court of Appeals is also in conflict with the following applicable decisions of this Court:

Curtis, Collins & Holbrook Co. v. United States, 262 U. S. 215, 43 S. Ct. 570, 67 L. Ed. 956;

Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 634, 20 S. Ct. 498, 44 L. Ed. 611.

It is also in conflict with the following applicable local decision:

Clifford Banking Co. v. Donovan Commission Co. (1906), 195 Mo. 262, 288, 94 S. W. 527, 535,

where it is held that "If such person accepts the property, he adopts the means by which it was procured; or, as Lord Ch. Justice Wilmot said, 'Let the hand receiving the gift be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it.' "

C. ARGUMENT AS TO THIRD QUESTION PRESENTED.

In Order to Avoid Confusion in the Administration of the Bankruptcy Act, This Court Should Settle Whether Local Law or Federal Law Is Controlling in Determining the Provability of Interveners' Claims.

In **Erie Railroad Co. v. Tompkins**, 304 U. S. 64, 78, 58 S. C. 817, 822, 82 L. Ed. 1188, 1194, this Court ruled that except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State, and that there is no Federal general common law. This Court said (304 U. S., l. c. 78):

> "Third. Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of Federal concern. There is no federal general common law."

In **Guaranty Trust Co. v. York** (June 18, 1945, not yet officially reported), 89 L. Ed. 1418, 65 S. C. 1464, which is believed to be the last word on the subject, this Court ruled that in essence the intent of the decision in **Erie R. Co. v. Tompkins** was to insure that in all cases where a Federal Court is exercising jurisdiction solely because of the diversity of the citizenship of the parties, the outcome of the litigation in the Federal Court should be substantially the same as it would be if tried in a State Court. This Court there said (65 S. C., l. c. 1470):

> "Erie R. Co. v. Tompkins was not an endeavor to formulate scientific legal terminology. It expressed a policy between State and federal courts. In essence, the intent of the decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to substantially different results."

It is believed, therefore, that this Court has left open and undecided the question whether Federal law or local law controls in determining the provability of interveners' claims where, as here, jurisdiction of the Federal Court does not depend upon diversity. It is believed further, however, that the one or the other is controlling, and whether the controlling law here is the Federal law or the local law, nevertheless, as we have shown above, the claims of interveners are provable under Sec. 63 (a) (4) of the Bankruptcy Act. It is believed that the Federal law, if applicable here, consists of the general law as set forth hereinabove.

CONCLUSION.

This case involves matters of importance in the administration of the Bankruptcy Act. It involves the proper application of local decision to question of local law. It involves the proper application of the rule in **Erie R. Co. v. Tompkins** to the determination of the provability of interveners' claims. These matters in order to avoid continuing confusion and litigation should be forthwith reviewed in this Court by Writ of Certiorari.

Respectfully submitted,

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January 9, 1946.

Supreme Court of the United States

No. 729.

OCTOBER TERM, 1945.

HARRY THEIS, WYLLYS K. BLISS AND W. L. HAGER, NOT INDIVIDUALLY BUT AS THE BONDHOLDERS' PROTECTIVE COMMITTEE IN THE MATTER OF CERTAIN BONDS OF GRAND RIVER DRAINAGE DISTRICT OF LIVINGSTON AND LINN COUNTIES, MISSOURI, THE ORIGINAL PETITIONER, AND EVERT G. CULLING, GLENN B. SCHAFFNER AND B. F. BARNHART, THE (PROPOSED) INTERVENERS,
PETITIONERS,
VS.
DURWARD BELMONT LUTHER, ALLEGED BANKRUPT, RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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STATEMENT OF THE CASE

We deem petitioners' statement decidedly argumentative and insufficient in certain respects and, therefore, submit the following on behalf of respondent.*

*Figures in parentheses refer to pages of the printed record except where otherwise indicated.

The matter before this Court is the opinion of the United States Circuit Court of Appeals for the Eighth Circuit (221 to 226), 151 F. 2d 397, which affirms an order (179, 184) of the District Court of the United States for the Western District of Missouri, affirming the order (59) of the Referee in Bankruptcy dismissing the involuntary petition in bankruptcy filed by the Committee and affirming the order (160) of the Referee sustaining the respondent's motion to strike the Committee's motion for a new trial (60), also his motion to strike the joint motion (63) of the Committee and Interveners Culling and Schaffner, and also his motion to strike the joint motion (73) of the Committee and Intervener Barnhart to vacate and set aside order of dismissal and to grant said Interveners leave to intervene and join in the second amended petition of the Committee.

On *July 27, 1944,* the Committee, as the sole petitioning creditor, filed an involuntary petition in bankruptcy (6) against respondent alleging that respondent's creditors were less than twelve in number. (Respondent will not refer to the other allegations of this petition now since they are incorporated in a second amended petition to which reference is made later.) On *August 7, 1944,* respondent filed his answer to said petition (11) in which, after praying for the dismissal of the petition for jurisdictional reasons and because it failed to state a claim upon which relief could be granted; he stated that he had more than twelve creditors and attached thereto a list showing the names, addresses, amounts owing to each and the security if any held by each (there were 22 unsecured creditors with claims varying in amounts from $6 to $7,000); denied any indebtedness to the Committee; stated that he was a farmer deriving the principal part of his income from the operation of a 917-acre farm in Ellis

County, Texas; denied the alleged acts of bankruptcy; denied that he was insolvent and attached to his answer a list of assets (27) totalling $193,400. On *August 9, 1944,* the Referee in Bankruptcy gave notice (29) to each of the creditors listed in respondent's answer advising them of the pendency of the proceedings and stating that a hearing would be had on August 21, 1944, "to the end that all parties in interest shall have an opportunity to be heard," and stating that the petition would be dismissed if at that time a sufficient number of qualified creditors did not join with the Committee's petition. On *August 21, 1944,* no additional creditors joined with the involuntary petition (53). On *August 21, 1944,* the Committee filed its first amended petition (211); on *August 31, 1944,* respondent filed his motion (217) praying for the dismissal of said proceedings and for an order dismissing said amended petition; on *September 15, 1944,* the Committee filed its second amended petition (30) *alleging* that respondent owed debts in excess of $1,000, that he was not a wage earner or a farmer, that he had less than 12 creditors, that the Committee had 4 claims against respondent, being (a) a promissory note for $22,243.75, (b) money collected as interest and principal on certain notes amounting to $3,527.70, (c) money collected as the proceeds of the sale of certain lands amounting to $19,272 and (d) money collected by respondent for the use of the Committee from the sale of 12 tracts of land and retained by respondent as "Unjust Enrichment" $15,819*; that these claims were "discovered" (42) August 25, 1944, September 5, 1944, and September 8, 1944; that respondent committed certain acts of bankruptcy; that respondent employed by Committee to acquire for it the title to certain lands at a

*This claim represents 12 transactions exactly like the claims of Interveners except as to the names, the amounts, and the description of the properties.

foreclosure sale of drainage tax liens and was instructed to ascertain the highest and best prices at which he could sell said lands, to negotiate and consummate the sale of said lands, to pay over the proceeds of the sale of said lands to the Committee "and otherwise act for the Committee in the liquidation of said lands." On *September 18, 1944*, respondent filed his answer to said second amended petition (42), again praying for the dismissal of the petition for jurisdictional reasons and because it failed to state a claim upon which relief could be granted, he denied any indebtedness to the Committee, stated he was a farmer, denied that his creditors were less than 12 and attached the same list of creditors (22 were unsecured), denied the alleged acts of bankruptcy and denied the claim of insolvency and attached the same list of *assets*. On *October 4, 1944*, the Referee entered his decree (59) in which he found that respondent's creditors were more than 12 in number and dismissed the second amended petition and the bankruptcy proceedings in accordance with his opinion (52) sustaining respondent's motion to dismiss Committee's petition and second amended petition. On *October 13, 1944*, the Committee filed a motion for new trial (60); on *October 13, 1944*, a joint motion of Interveners Culling and Schaffner and the Committee (63) was filed, asking the Referee to set aside the order of dismissal and to grant said Interveners leave to intervene and join with Committee's second amended petition. The proposed petitions of the Interveners were attached as exhibits to the motion (66, 69) and stated that because of certain alleged fraudulent representations by respondent in connection with written contracts for the purchase of certain lands from the Committee respondent was indebted to them. These claims were identical with the 12 items of the fourth claim of the Committee's second

amended petition except as to names and amounts and the description of the lands. The same attorneys represented the Committee and the proposed Interveners. On *October 26, 1944,* a joint motion of Intervener Barnhart and the Committee (73) was filed; this motion was exactly like the immediately preceding motion except as to names and amounts and description of the land. On *October 30, 1944,* respondent filed his motion (80) to strike the Committee's motion for a new trial from the files or in the alternative to overrule said motion; respondent also filed his motion (82) to strike from the files the two joint motions of the Committee and the three Interveners. On *November 3, 1944,* Intervener Schaffner filed an affidavit (85) concerning his claims, to which was attached certain photostatic copies of contracts for the sale of lands and in which the affiant claims the second page was rewritten and substituted and that as a result he was required to pay more for the land than he offered to pay. No statement is made in the affidavit or by the Committee in its second amended petition as to when or by whom the pages were exchanged. Intervener Culling filed a similar affidavit (111); Barnhart's affidavit is shown at (135). On *December 4, 1944,* the Referee in Bankrupcty entered his decree (160) in which he found that Interveners Culling, Schaffner and Barnhart were not creditors of respondent and sustained respondent's motion to strike the Committee's motion for a new trial from the files, also sustaining respondent's motion to strike the two joint motions of the Committee and the three Interveners, to vacate the order of dismissal and for leave to intervene and join with Committee's second amended petition. Said decree was in conformity with the Referee's opinion (155) holding that Interveners were not creditors of respondent, that the Interveners got the

land they offered to buy and for the price they agreed to pay and that they got all that they bargained for according to the contracts which they signed; that if respondent owed anyone on the claims alleged by Interveners it was the Committee and not the Interveners. On *December 13, 1944*, the Committee and Interveners filed their joint petition to review the Referee's order dated December 4, 1944 (162), and the Committee filed its petition to review the Referee's orders of October 4, 1944, and December 4, 1944 (69).

On *April 12, 1945*, Judge Albert L. Reeves, Judge of the District Court of the United States for the Western Division of the Western District of Missouri, entered his decree (184) holding that the Referee in Bankruptcy properly dismissed the involuntary petitions in bankruptcy for the reasons and upon the grounds stated in his order and said orders of the Referee and each of them were in all things confirmed. The decree was in accordance with the Judge's memorandum opinion (179) holding that, *first*, respondent had more than 12 creditors, and, *second*, that Interveners were not creditors of respondent.

Petitioners appealed from the judgment of the District Court to the United States Circuit Court of Appeals for the Eighth Circuit. On *October 29, 1945*, the Circuit Court of Appeals filed its opinion and entered judgment (221 to 226) affirming in all respects the several orders and the judgment of dismissal of the District Court. On *November 13, 1945*, petitioners filed their petition for a rehearing (227) which was denied *December 5, 1945* (261). On *December 14, 1945*, the Court of Appeals stayed the mandate for thirty days pending the disposition of petitioners' application for a writ of certiorari (261).

SUMMARY OF THE ARGUMENT.

The bankruptcy proceedings were properly dismissed because (A) The involuntary petition was filed by only one alleged creditor and respondent had more than 12 creditors; (B) The interveners are not creditors of respondent; (C) There never has been a valid petition in bankruptcy on file or a valid proceeding in bankruptcy in which intervention could be filed.

ARGUMENT.

THE BANKRUPTCY PROCEEDINGS WERE PROPERLY DISMISSED BECAUSE:

(A) The involuntary petition was filed by only one alleged creditor and respondent had more than 12 creditors.

Two simple legal questions are involved.

(1) Where an involuntary petition in bankruptcy filed by only one alleged creditor claims that the alleged bankrupt had fewer than 12 creditors, *are creditors whose claims are "small in amount, current claims, payable at stated intervals" to be counted in determining how many creditors must join in the involuntary petition?*

(2) Where it is alleged that the respondent as the petitioners' trustee and agent received interveners' offers to purchase petitioners' land, the amount of which offers was voluntarily paid by interveners, and the title to which land was received by interveners and has never been questioned; and that the respondent was unjustly enriched by pocketing the difference between the price which interveners offered and did pay, and the price which he represented to petitioners as having received, *do the alleged interveners thereby have provable claims against respondent so as to permit them to be counted with petitioners in determining whether three or more creditors were seeking involuntary bankruptcy proceedings against respondent.*

Certainly these questions are not *special* or *important* enough for the Supreme Court of the United States to take jurisdiction. Both questions have been decided many times by many different courts and with but few excep-

tions,* have been decided uniformly in favor of respondent's positions here. There are no appellate court decisions to the contrary.

The original petition filed by the Committee stated:

> "Your petitioners are informed and believe that and therefore represent that all the creditors of said Durward Belmont Luther are less than 12 in number."

In due time respondent filed his answer in which he denied that he had less than 12 creditors and filed therewith under oath a list of 22 unsecured creditors showing their names and addresses and the amounts owing to each and a statement of the nature of the claims.

Section 59(d) of the Bankruptcy Act provides:

> "(d) If it be averred in the petition that the creditors of the bankrupt, computed as provided in subdivision (e) of this section, are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses and a brief statement of the nature of their claims and the amounts thereof, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that the parties in interest shall have an opportunity to be heard. If, upon such hearing, it shall appear that a sufficient number of qualified creditors have joined in such petition or, if prior to or during such hearing, a sufficient number of qualified creditors shall join therein, the case may

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*In re Blount, (D. C.) 142 Fed. 263.
In re Burg, (D. C.) 245 Fed. 173.
In re Branche, (D. C.) 275 Fed. 555.

be proceeded with, but otherwise it shall be dismissed."

Accordingly, on *August 9, 1944,* a notice was duly mailed, by the Referee in Bankruptcy, to each of said creditors advising them of the pendency and nature of the petition and that the hearing on the petition would be delayed for a reasonable time so that the parties in interest would have an opportunity to be heard. The notice (29) provided in part as follows:

> "Therefore, the Court as required by law, has caused all such creditors to be notified of the pendency of such petition and has delayed the hearing upon said petition for a reasonable time until Monday, August 21, 1944, at eleven o'clock in the forenoon, 426 U. S. Court House, Kansas City, Missouri, to the end that all parties in interest shall have opportunity to be heard.
>
> If upon such hearing, at said time, it shall appear that a sufficient number of qualified creditors have joined in such petition or, if prior to or during such hearing, a sufficient number of qualified creditors shall join therein, the case may be proceeded with, but otherwise it shall be dismissed."

On *August 21, 1944,* the date indicated in the notice for the hearing, none of said creditors had joined in the petition, and none joined that day. However, on this same day the petitioning creditor, over the objection and exception of respondent, was granted leave to file a first amended petition. Respondent duly filed his motion to strike said amended petition and to dismiss these proceedings. On *September 14, 1944,* the petitioning creditor, over the objection and exception of respondent, filed a second amended petition.

In all of said petitions substantially the same allegation is made, that is, that respondent's creditors are less

than 12 in number. No other creditor has ever joined in the petitions. This particular issue remains the same and these proceedings under the law must be dismissed unless, as contended by the Committee, the creditors listed by respondent are insufficient in number because some are for small amounts.

The word "creditor" is defined in Section 1 (11) of the Act as follows:

> "(11) 'Creditor' shall include anyone who owns a debt, demand, or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy."

It will be noted that there is no limitation as to the amount of the claim nor the consideration therefor. Provable claims, debts which may be proved, are set out in Section 103 of the Act. There is no provision in this section which designates the amount of the claim nor the nature thereof, nor that claims for current expenses usually paid at stated times, shall be excluded and cannot be proved.

Section 59(e) of the Bankruptcy Act is as follows:

> "(e) In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, there shall not be counted (1) such creditors as were employed by the bankrupt at the time of the filing of the petition; (2) creditors who are relatives of the bankrupt or, if the bankrupt is a corporation, creditors who are stockholders or members, officers or members of the board of directors or trustees or of other similar controlling bodies of such bankrupt corporation; (3) creditors who have participated, directly or indirectly, in the act of bankruptcy charged in the petition; (4) secured creditors whose claims are fully secured;

and (5) creditors who have received preferences, liens, or transfers void or voidable under this Act."

Section 59(e) of the Bankruptcy Act of 1898 is as follows:

"(e) In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted."

Section 59(d) of the Bankruptcy Act is in part as follows:

"(d) If it be averred in the petition that the creditors of the bankrupt, computed as provided in subdivision e of this section, are less than twelve in number, and less than three creditors have joined as petitioners therein, * * *."

From the foregoing quotations, it is clear that Congress intended that subdivision (e), *supra*, should be the sole basis of computation in determining the number of creditors.

That Congress considered small creditors is shown by the fact that it limited their right to vote at creditors' meetings. Section 56(c) of the Chandler Act is an entirely new section. It provides:

"(c) Claims of $50 or less shall not be counted in computing the number of creditors voting or present at creditors' meetings, but shall be counted in computing the amount (July 1, 1898, 30 Stat. at L. 544, Ch. 541, Sec. 56; June 22, 1938, 54 Stat. at L. 802, Ch. 575. Sec. 1 (11 U. S. C. A., Sec. 92).)"

Nevertheless, Congress did *not* exclude small claims in counting the number which must join in an involuntary petition. The Congress could easily have included such an exception in Section 59(e), but since it did not do so, it can be safely assumed that it did not intend that the Act should contain this exception as stated by Referee Bundschu (56):

> "* * * however, Congress did not see fit to specifically place a limitation on small creditors in computing the number of creditors of a bankrupt for determining how many creditors must join in an involuntary petition under Section 59, subdivision e. Therefore it is rational to conclude that had Congress any intention of eliminating or restricting the right to count such small creditors under that section it would have spoken on the subject. By its silence Congress left that subject where it was before the Bankrupt Act of 1938 was passed."

We submit, therefore, that in view of the plain and unambiguous language of the statute that the petitioning creditors should not be permitted under the guise of construction to include in the Act a clause clearly not intended by the Congress. To do so, we respectfully submit, would amount to judicial legislation.

We refer the court to the case of *Winkleman* v. *Ogami*, (C. C. A. 9) 123 F. 2d 78. In discussing this section of the Act the court stated, l. c. 80:

> "We see no persuasive reason for engrafting extra-statutory limitations on those provisions of the Chandler Act which prescribe the qualifications of petitioning creditors, *since terms having elsewhere in the law a well defined meaning were deliberately used*" (Emphasis ours).

Our attention has been called to the cases of *In re Blount*, (D. C.) 142 Fed. 263; *In re Burg*, (D. C.) 245 Fed.

173, and *In re Branche,* (D. C.) 275 Fed. 555; it being contended that these cases support the Committee's theory that creditors having small claims are not to be counted in determining the number of creditors who must join in the petition. In the *Blount* case the bankrupt fraudulently kept the claims alive in order to prevent a single creditor from filing a petition against him and as stated in the case of *In re Alden,* 2 F. 2d 61, the *Burg* and *Branche* cases "followed the Blount case, without noticing the fraud involved therein."

Judge Lowell states further on in the opinion in the *Alden* case in discussing the *Blount, Burg* and *Branche* cases, l. c. 61, 62:

> "With due deference to the learned judges who have decided these cases, they do not commend themselves to my judgment. Doubtless it would be convenient to disregard the bills of the butcher, the baker, and the candlestick maker as beneath the dignity of the bankruptcy court, but I find in the Act no authority for such a course.
>
> In the case at bar there is no intimation that any claims were kept alive in order to prevent a creditor from bringing his petition against the bankrupt. * * *"

See also *In re Hall,* 27 F. 2d 999. In this case the same contention as that now made by the Committee was raised, namely, that creditors having small claims should not be counted. But Judge Gibson held that they should be counted. The court stated, l. c. 999, 1000:

> "Gibson, District Judge. On February 15, 1928, a petition in bankruptcy was filed against Theodore G. Hall by Lloyd Hill, who alleged that the creditors of Hall were less than 12 in number. Subsequently the matter was referred to the referee of Bedford County as special master, to take testimony and report thereon to the court. The special master, after taking

testimony, reported that the creditors of Theodore G. Hall numbered 18, but of this number 3 were relatives and were not to be considered under the statute. Another creditor was fully secured, and also was to be excluded. Of the 14 remaining creditors, 3 had small claims against the alleged bankrupt, which the referee, as special master, reported should not be counted in making up the number of the creditors of the alleged bankrupt. These creditors were Mrs. Martha Huff, who had owing to her $8 for room rent, which was payable February 1, 1928; James V. Fisher, who had due him $5 for cigars furnished bankrupt in 1927; and Mrs. Amy Stapleton to whom bankrupt was indebted in the amount of $20 for boarding, which was due January 31, 1928.

* * * * * * *

Congress, in the exercise of its judgment, has determined that a petition in bankruptcy may be filed by one creditor, where the creditors number less than 12; and it has determined that, where the creditors are in excess of 12 in number, 3 creditors must unite in the petition before the petition in bankruptcy is effective. *It has not limited the creditors to merchandise creditors, and we find no warrant in law for the rejection of any bona fide provable claim in bankruptcy.* So far as appears by the testimony, each one of the three claims rejected by the referee are actual existing debts of Hall, and should be included. The claim of C. T. Benner, perhaps, should have been rejected, as he was the holder of a preference by legal proceedings; but, if the three rejected claims are to be included, the exclusion of his claim would still leave the actual creditors 13 in number, more than the statutory number on which the petition depends.

An order must be drawn for the dismissal of the petition" (Emphasis ours).

However, the question was finally resolved against petitioners' contention by the Eighth Circuit Court of

Appeals in the case of *Grigsby-Grunow* v. *Hieb Radio Supply Co.*, 71 F. 2d 113. Here again the same contentions were made. The court stated, l. c. 114:

> "(3) Complaint is made as to the action of the trial court in finding that the total number of the creditors of the alleged bankrupt is more than twelve. Among the creditors eliminated by the special master and included by the trial court are ten whose respective claims are small in amount, and evidently bills for current expenses. The special master found that these ten claims should not be counted as creditors in the determination of the sufficiency of the petition, for the reason that the several claims 'are accounts that are expected to be paid monthly.' There is nothing in the record to indicate that any of the ten claims in question are fictitious or fraudulent in any way, but it is the contention of appellant that it is the purpose and intention of the Bankruptcy Act to effect an equitable distribution of the assets of the insolvent debtor among all of its creditors and prevent preference, and that it is the duty of the courts to carry the intention of the law into effect, and that to permit a debtor to obtain the dismissal of an involuntary petition by including in his list of creditors holders of current claims, small in amount, payable at stated intervals, operates to defeat the real spirit and intent of the bankruptcy law. *However persuasive this argument may be, it is one which might more properly be addressed to the Congress than to the court.* The entire procedure is regulated by statute, and is covered by Section 59b of the Bankruptcy Act (U. S. C. A., Title 11, Sec. 95(b)), which reads as follows: '(b) Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to $500 or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.' *The language of*

this statute is plain and free from ambiguity, and to read into it that which is contended for by appellant would be nothing less than judicial legislation.

The holder of each of the ten claims under discussion was a creditor of the alleged bankrupt at the time the petition was filed, and, allowing for all proper deductions from the list of creditors set forth in the answer, the record clearly shows the number of creditors to be in excess of twelve, and the trial court committed no error in dismissing the petition.

The order appealed from is therefore affirmed" (Emphasis ours).

We call the court's attention to the fact that Section 59(b) of the Bankruptcy Act, on which the court in the *Grigsby-Grunow* case based its opinion, is the same today as it was at the time that case was decided except that the words *fixed as to liability and liquidated as to amount* have been added after the words "provable claims" in the first line.

See, also, *In re Murray,* 14 Fed. Supp. 146. All of the foregoing decisions are cited in the opinion and the court finally stated, l. c. 147:

"Thus it appears from the more recent cases and from the only Circuit Court of Appeals cases found and the better view is that the small running account claims should be counted as of the date the petition is filed, because no exception has been made with regard to them and they are claims provable in bankruptcy.

The report of the special master must be confirmed and it is so ordered."

Counsel for the petitioners argue that if the rules *Inclusio unius est exclusio alterius* and *de minimis non curat lex* were applied here, small creditors would not be counted. As to this argument Judge Reeves stated in his opinion (181):

> "It will be noted that the statute indicates what creditors shall not be counted. By proper construction under the rule, '*Inclusio unius est exclusio alterius,*' other creditors would be counted. The very fact that the items are small would not warrant their exclusion, nor neither would their exclusion be warranted under the rule *de minimis non curat lex.* There are cases where the latter doctrine is properly applicable in bankruptcy but (no) in a case of this character."

See, also, *In re Myron M. Navison Shoe Co.,* (D. C.) 33 F. 2d 1007, and *Myron M. Navison Shoe Co.* v. *Lane Shoe Co.,* (C. C. A. 1) 36 F. 2d 454. In these cases creditors with small claims were counted in determining the number of creditors, and the Court of Appeals ordered the petition dismissed.

Petitioners do not suggest the minimum amount of claims which should be counted and below which minimum they should not be counted. It is readily seen that if petitioners' contention should be sustained it would result in many different standards, each depending upon the opinion of the judge to whom the question should be presented.

At page 40 of petitioners' brief, they quote from the report to Congress on the Chandler Act with reference to Section 59(e). The report states "the amendment follows the authorities and is simply declarative of the case made law." This can give no comfort to the petitioners because the case made law must be found in the decisions of the Circuit Court of Appeals, such as *Grigsby-Grunow* v. *Hieb Radio Supply Co., supra, Navison Shoe Co.* v. *Lane Shoe Co., supra,* and district court cases, such as *In re Alden, supra; In re Hall, supra,* and *In re Murray, supra,* and not in the earlier district court cases.

Petitioners have cited the case of *Leighton* v. *Kennedy,* (C. C. A. 1, 1904) 129 Fed. 737, 739, for the proposition that creditors having small claims should not be counted, and that, therefore, it is in conflict with the opinion in this case (petition for writ of certiorari p. 8). We respectfully submit that this is not the holding in the Leighton case. The facts as shown by a stipulation filed in the case were these. An assignee in an assignment for the benefit of creditors purchased with funds of the assigned estate several claims against the alleged bankrupt 16 days before the petition in bankruptcy was filed, and 4 days before the petition in bankruptcy was filed, l. c. 738:

> " 'The twelve accounts assigned as aforesaid to Martin were, on March 24, 1903, assigned by said Martin to twelve different persons, who respectively paid to Martin for the several accounts the same amount that Martin had paid for the respective accounts.'
>
> 'The purpose of Martin and his assignees in making and taking these assignments of March 24, 1903, from Martin, was to keep claims enough alive to prevent a single creditor from maintaining a creditor's petition in bankruptcy against said Albert Leighton, and to prevent these claims from merging in himself, and to exclude the possibility of his being counted as only one creditor in case of bankruptcy proceedings against said Leighton.' "

The court held, l. c. 739 and 740:

> "* * * To the time when the petition in bankruptcy was filed Leighton had not repudiated them; so that, for this case, all the debts thus assigned must be held to have been extinguished by payments from his assets, or on his account. The only alternative would be to hold that Leighton even then retained the right of affirming or rejecting, thus leav-

ing him at his option to play fast and loose with reference to proceedings in bankruptcy, which, of course, could not be permitted. Therefore, according to the settled practice in bankruptcy, those debts are not to be counted in computing the outstanding creditors with reference to the number required to unite in an involuntary petition. Bump's Bankruptcy (10th Ed.) 439. This, of course, would not prevent these creditors from surrendering, after an adjudication in bankruptcy, the case received by them as unlawful preferences, and from proving their debts. *Neither, according to the well-settled practice in bankruptcy* (Bump's Bankruptcy (10th Ed.) 439), *would it prevent them from uniting in an involuntary petition, and counting as creditors accordingly, unless the petition was based on preferences given them.*

* * * * * * *

The eight claims which were, by Martin's procurement, assigned to different persons who paid no consideration therefor, are also subject to further observations which easily dispose of them. Unless regarded as discharged from the assigned assets of Leighton in the manner we have stated, they belonged in equity to Martin; and the interests of the several persons to whom they were nominally assigned were unsubstantial, and not cognizable in bankruptcy proceedings, which, as we have several times held, are governed by equitable rules. It is the settled practice in the United States in bankruptcy that choses in action which have been assigned before a petition is filed are to be proved by the assignee as being the substantial party in interest. * * *" (Emphasis ours).

This case is an authority for respondent.

We deem further citation of authorities and argument unnecessary; under the statute and the decisions it is clear the respondent had more than 12 creditors and since none joined the Committee's intervening petition, it was properly dismissed.

(B) Interveners are not creditors of respondent.

The allegation in the Committee's second amended petition respecting respondent's employment by the Committee is as follows (31):

> "During the two years next preceding the period herein next mentioned, the said Durward Belmont Luther was employed by your petitioners to inspect all lands located within said Grand River Drainage District and report to your petitioners in respect to the value thereof. During the period between the 1st day of July, 1935, and November 24, 1943, the said Durward Belmont Luther was employed by your petitioners as their Field Agent, to acquire in their behalf from time to time tracts of land in said Grand River Drainage District at foreclosure sales of the drainage tax liens securing the bonds held by your petitioners; *to ascertain from time to time the market value of lands so acquired and to report such values to your petitioners; to ascertain from time to time the highest and best prices at which he could sell said lands for your petitioners;* to develop sales therefor and recommend to your petitioners, based upon his knowledge of such highest and best prices, as to acceptance or rejection by your petitioners of offers to purchase said lands resulting from his said efforts; to negotiate and consummate sales of said lands at the highest and best prices obtainable; and to collect for and on behalf of your petitioners and pay over to them the proceeds in cash and notes of such sales, and otherwise to act for your petitioners in the liquidation of said lands" (Emphasis ours).

Accordingly, it was respondent's duty to obtain offers for the purchase of these lands and submit the offers to the Committee in the form of proposals to purchase, setting forth the amount the purchaser would pay. Respondent did not know the amount for which the Committee would sell the properties and at no time ever

named a figure. The interveners voluntarily offered to buy and voluntarily named the price they would pay without any previous statement from respondent concerning the price. These proposals were in the form of a contract of purchase and sale between the Committee and the purchaser and were to be signed by the proposed purchaser in triplicate and forwarded to the Committee. If accepted they were to be signed by the Committee, thereby becoming a written contract. One copy was to be retained by the purchaser, one by the Committee and one by respondent. Following this custom each of the interveners signed separate proposals which provided that even though they were signed by the proposed purchaser they were not binding on the Committee until approved and signed by the Committee. Intervener Culling offered to pay $1,485, Schaffner $940 and Barnhart $840 as the respective purchase prices for the lands they wanted to buy. A copy of the contract purporting to be approved and signed by the Committee was delivered to each Intervener. Thereafter, each Intervener paid to respondent in cash, or in cash and notes, the amount he had offered to pay, as the purchase price, and received a deed conveying to him the land he had purchased—*the title to which he still retains and has never been questioned.*

Interveners, in their affidavits filed in this proceeding (85, 111 and 135) state that on October 9, 1944, they were shown by the Committee copies of contracts purporting to be signed by each Intervener and the Committee, that they were not the same as the contracts which were previously returned to each Intervener by respondent. The difference being that in the contracts shown to Interveners by the Committee on October 9, 1944, the purchase price was less than the purchase price proposed to be paid by Interveners and set out in the contracts

and proposals to purchase, submitted by Interveners to the Committee, and less than the price actually paid by Interveners to respondent.

The court's attention is called to the fourth claim in the Committee's second amended petition and Exhibit "D" (42) attached to that petition. This claim alleges a debt due the Committee from respondent amounting to $15,819 arising from sales made by respondent similar to the sales made to Interveners. In Exhibit "D" are set out twelve different sales made by respondent which the Committee states were made at prices in excess of the amounts reported to the Committee, the difference, the Committee claims, was retained by respondent and the Committee claims respondent is indebted to it for that alleged difference.

The Committee sets forth in this claim the same method of making sales as is now claimed by Interveners. If respondent is the debtor of the Committee (which we deny) for the difference between the amounts reported to the Committee as received by him, and the amounts actually received by him, he likewise is indebted to the Committee on the sales to Interveners for the amounts he received above the amounts alleged to have been reported to the Committee. Learned counsel representing the Interveners are also counsel for the Committee and it is strange they would assume such inconsistent positions on claims concededly in the same class.

Briefly, the claim made by the Interveners is that Interveners were led by respondent to believe that the Committee had accepted the prices Interveners offered to pay for the lands which Interveners desired to purchase and which prices were stated in the written proposals of purchase made by Interveners to the Committee, being the amounts which Interveners did pay for such

lands; that Interveners learned, on October 9, 1944, that the Committee might have sold said lands to Interveners for a smaller amount than they paid. They contend that respondent is indebted to them for the difference between the amounts they offered to pay and did pay, and the lesser amounts which they have learned the Committee might have accepted.

In the affidavits filed by Interveners *it appears conclusively that Interveners voluntarily offered to buy lands and voluntarily named the purchase price they would pay therefor;* thereupon purchase contracts in triplicate were drawn in which the purchase price named by Interveners was set forth, these three copies of the contract were signed by Interveners. The contracts specifically state that the signing of the contracts by the proposed purchasers does not bind the vendors, that the Committee was not bound in any way until and unless they accepted the offer made by the proposed purchasers.

It thus clearly appears that no representation as to the amount of the sale price was made by respondent. It also appears that Interveners were willing to pay as the purchase price the amounts they offered.

It is significant that neither the Committee nor the Interveners are seeking to rescind the sales. Both appear to be satisfied with the deals they made.

Respondent owed no duty to advise the Interveners that the Committee would accept less than the Interveners had offered; had he done so he would have violated his legal duty to his principal and would have been liable to his principal for its loss.

> "If a broker employed to sell property who falsely understates to the principal the best price or terms obtainable; the principal may recover from him the difference between that obtained and that

which might have been obtained." 9 C. J., Sec. 38, p. 537 (cases cited in Note 30); 12 C. J. S., Sec. 41, p. 99 (cases cited in Note 64, p. 99).

The contention of the petitioning creditor and Interveners necessarily is that the Interveners were entitled to purchase the real estate at the lowest price the Committee would take; that the Interveners were defrauded because respondent should have told Interveners that the Committee was willing to accept a lower amount than that offered by Interveners; and that respondent is liable for the difference to the Interveners.

This contention is not supported by the decisions.

A recovery was denied to the purchaser in the case of *McLennan* v. *Investment Exch. Co.*, (1913) 170 Mo. App. 389, 156 S. W. 730, wherein it appeared that the real estate brokers, learning that a purchaser would pay $12,000 for certain property, obtained a contract from the vendor for the land at a price of $11,500. After securing this contract they returned to the purchaser, and, still claiming to be the agents of the vendor, represented that the lowest price their principal would put on the farm was $13,005. The sale was eventually closed for $12,928.50. It was held that the fraud, if any, was against the principal, since the brokers were acting for the vendor, and not for the purchaser. It was said further that since the plaintiff's testimony showed that he purchased the farm at his own price for less than it was worth, no damage resulted to him by the broker's actions. The court said:

> "Under the rule of *caveat emptor*, which recognizes the parties to a sale as business antagonists dealing at arm's length, the purchaser has a right to buy at as low price as his skill will secure, and the vendor has the corresponding right to sell at the best price he can obtain. Neither has the legal right to the

other's best price, and therefore the representation of either that he has made his best offer cannot be said to be a representation of a material fact. To say otherwise would be to impose a restriction of the right of persons to make their own bargains. We agree with plaintiff that defendants in law and in fact were the agents of Elebracht in the transaction. The trick by which they pretended to purchase the property themselves was nugatory as to their principal. The law would not permit them to do such violence to the trust and confidence their principal had reposed in them. *Therefore, the representations they made to plaintiff were the representations of their principal, and as they did not relate to a material fact and did not damage plaintiff, he has no cause of action*" (Emphasis ours).

The facts in the instant case are more persuasive than those in the *McLennan* case because here respondent made no representation concerning the "lowest or best price" which the committee would take, but on the contrary each intervener voluntarily named the price he would pay and did pay for the land. Therefore, the question as to whether or not there was a misrepresentation of the petitioners' lowest or best price is not involved in this case.

In *R. Harris & Co.* v. *Weller,* 280 Fed. 980, the court stated, l. c. 987:

"* * * Certainly the agent was entitled to do what his principal could have done, namely, obtain the highest price the purchaser could be induced to pay, and such is the law. *McLennan* v. *Exchange Co.,* 170 Mo. App. 389, 156 S. W. 730; *Ripy* v. *Cronan,* 131 Ky. 631, 639, 640, 115 S. W. 791, 21 L. R. A. (N. S.) 305. In the case last cited the court, after directing attention to the fact that no obligation to buy rested upon the purchaser, said:

> *'If the law were as contended for by appellant, then every vendee of property could escape the obligation of his contract, just so he afterwards established the fact that at the time of the sale the vendor or the agent representing him was willing to take less than he represented that he would take for the property disposed of.* This would impose no duty on the purchaser. The validity of his purchase would depend, not upon what he was willing to pay, but upon the price at which the property might be purchased' " (Emphasis ours).

Petitioners contend that the opinion is contrary to the Missouri law and that the rule in the *McLennan case, supra,* has been modified by *Hack* v. *Crain,* (Mo. Sup.) 1915, 177 S. W. 587; *Hays* v. *Smith,* (Mo. Sup.) 213 S. W. 451, and *McClure* v. *H. R. Ennis R. E. and Investment Co.,* (K. C. Court of Appeals) 1925, 219 Mo. App. 112, 268 S. W. 675.

These cases hold in effect that an action for fraud and deceit can be brought against a dishonest agent for a positive misrepresentation of his authorized sales price or of a material fact, but do not support any right of action other than one in tort for fraud and deceit. In the *Hack case, supra,* the court said:

> "The petition proceeds upon the theory that plaintiff was ignorant of the character of the soil and the value of the land purchased, and that defendant knew those facts, and that, after plaintiff informed defendant thereof and told thim that he was going to rely upon his judgment as to the character and value of the land, then, under the facts and circumstances stated in the petition, which were fully proven by the evidence, the conduct of the defendant clearly constituted such a deception and fraud upon the plaintiff as to entitle him to the relief prayed, regardless

of the question as to whether or not he had also perpetrated a fraud upon the vendor of the land."

The case is clearly not in point. Respondent here made no representations whatsoever as to "the character of the soil and the value of the land purchased."

The *Hays case, supra,* approves the general principles announced in the *McLennan* decision, *supra,* and cites it with approval on the point of an alleged misrepresentation of the seller's best price as follows:

> "Appellant complains of defendants' instruction numbered 2, which reads as follows:
>
> > 'The court instructs the jury that it stands conceded that defendants (Smith and Catron) told plaintiff (Hays) that they were Akeman's agents, and you are instructed that any statement by defendants, or either of them, that the least Akeman would take for the land was $75 per acre, does not alone constitute fraud, and the jury cannot find such statement, if made, fraudulent, or base any verdict for plaintiff thereon.'
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> * * * * * * *
>
> It is manifest from the foregoing that plaintiff 'knew' defendants were representing Akeman in the land deal, 'and that he was representing himself.' Plaintiff was dealing at arm's length with Akeman's agents. * * * *McLennan* v. *Exchange Co.*, 170 Mo. App. 389, 156 S. W. 730. * * * Defendants did not assume to act for plaintiff at any stage of the proceedings, but, on the contrary, were representing his adversary.
>
> Keeping in mind the petition herein, as well as the facts aforesaid, we are of the opinion that the trial court committed no error in giving the above instruction."

Nor is the *McClure case, supra,* in point. In that case there was no representation by the agent of the seller's

best or lowest selling price. There the agent misrepresented to the purchaser that he had an option to purchase the land which would expire on a certain date and that unless the purchaser signed the contract of purchase on that date the option would be lost. These misrepresentations, so the court stated, were the inducing causes of the purchaser signing the contract and paying the earnest money.

Petitioners have cited *In re International Match Corp.*, (C. C. A. 2, 1934) 69 F. 2d 73, 75. There the controversy was between the principal and its agent. The case holds that the principal may have a provable claim against its agent for unjust enrichment even though the principal had previously sued its agent for conversion. It is no authority for interveners' contention that they have provable claims for unjust enrichment or in *quasi* contract against respondent.

We have examined the other cases cited for petitioners, and as stated by Judge Woodrough in the Court of Appeals' opinion in this case (225)—"We are not persuaded that the facts shown in respect to their purchases of land from the Committee through its trustee-agent gave rise to any contract or quasi contract obligation on the part of the agent to divert his unjust enrichment from the Committee (to which he was bound to account for it) to the purchasers. The Committee never assigned or relinquished its rights to the purchasers."

The petitioners apparently realized that a claim in tort for damages for deceit or fraud (all of which is denied by respondent) would not constitute a provable claim, fixed as to liability and liquidated as to amount and, therefore, have attempted to create claims for unjust enrichment in interveners and thereby obtain the requisite number of petitioning creditors. These claims, if they exist (and respondent denies their existence), should

have been included in the "4th claim" of the committee's petition where 12 other similar claims are listed. Respondent filed a list of 22 *bona fide* unsecured creditors who were notified and given an opportunity to join with the committee's involuntary petition. Not one of them joined in the action. The conclusion, therefore, is inescapable, *that no one wants respondent declared bankrupt except the committee.* If the committee has a *bona fide* claim against respondent the matter can be tried out in the State Court. There is no occasion to have respondent declared bankrupt, particularly when the pleadings and evidence adduced so far show that he is not insolvent.

(C) There never has been a valid petition in bankruptcy on file or a valid proceeding in bankruptcy in which interventions could be filed.

A person seeking to intervene in litigation takes the litigation as he finds it. The petition in bankruptcy filed by the Committee does not support a bankruptcy proceeding in its true sense. The general purpose of a bankruptcy proceeding is to preserve and to distribute the assets of the bankrupt for the benefit of all his creditors. Not so with the case before the court. The petitioning creditors are interested solely in themselves and in their own alleged claim. The creditors have adopted the expedient of attempting to substitute a bankruptcy proceeding for an ordinary suit at law.

The petitioning creditors in the first instance filed a petition in which it was alleged that the number of creditors of the respondent were less than twelve when in truth and fact there were more than twelve. This questionable practice has become too common. It is a well-known fact that few persons are able to withstand the impact of an involuntary petition in bankruptcy and that petitioning

creditors file the petition with the hope of a consent to adjudication. The petitioning creditors in this case persisted in this method of attack long after a verified list of the respondent's creditors was filed in court showing that there were more than twelve in number. This practice was characterized in the case of *Navison Shoe Company* v. *Lane Shoe Company,* 36 F. 2d 454, 459, as "a fraudulent attempt to confer jurisdiction upon the court where none existed." If, therefore, the petition in this case was filed either with knowledge on the part of the petitioners that the allegation of less than twelve creditors was false or if the allegation was recklessly made not caring whether the allegation which the Committee affirmed as of its own knowledge to be true was true or false, the petition was a fraud upon the court and conferred no jurisdiction upon the court. The court's jurisdiction having been imposed upon in the first instance and this imposition is accentuated by filing two amended petitions containing the same allegations, there is no proceeding before the court to which the Interveners would be entitled to join.

The interventions are not petitions in bankruptcy upon which an adjudication could be made but merely an attempt to assert a claim. In *Despres et al.* v. *Galbraith,* 213 Fed. 190, 193 (C. C. A. 8):

> "We are of opinion that the petition of February 1, 1912, was void for the want of proper petitioners. That being true, the intervening petition could draw no support from it. The rule is clearly stated by the court in *Robinson* v. *Hanway,* Fed. Cas. No. 11953, as follows:
>
> > 'But we are of opinion that the original creditors' petition is void for want of proper petitioners, and did not give the court jurisdiction of the case, and that the intervening petitions are also void for want of an original petition to give

them force. It is not a case of amendment of a defective petition of which the court has jurisdiction, and when the interveners perfect the petition by additional numbers and amounts. But it is an attempt to give life to a dead petition, to ingraft branches upon a lifeless stock, and infuse vitality into it. The interveners must draw their support, if at all, from the original petition; but in this case the original petition is dead, and neither supports the interveners nor itself.' "

On October 4, 1944, the referee entered his order dismissing the petition. This is in accordance with Section 59(d) of the Bankruptcy Act which provides that if, after notice has been given, a sufficient number of qualified creditors have not joined in the petition, the case shall be dismissed. There is no provision in the Bankruptcy Act whereby after the order of dismissal the proceeding can be kept alive for the purpose of receiving intervening petitions. At no place in the Bankruptcy Act is it even suggested that the proceedings may be kept alive by the expedient of filing a motion for a new trial.

In addition to this, there are equitable reasons why the interventions should be denied. The Committee in its motion for a new trial (61, Par. c) rather brazenly states that it was deprived of its right to negotiate and solicit the Interveners to join in this petition. We are aware of the fact that in some bankruptcy cases District Courts have stated that the petitioners may solicit others to join with them in the petition but we doubt very mcuh if any court would extend this to the point where it resulted in the stirring up of litigation where none existed before. Whatever the rule may be elsewhere, it is contrary to the public policy of the State of Missouri and has been denounced and made a misdemeanor by Sec. 4320, R. S. Mo., 1939.

It is interesting to note that the same attorneys appear as attorneys for the Committee and for the Interveners and that the intervening petitions (66, 69, 76) are verified by the chief counsel for the Committee. It becomes apparent, therefore, that this entire proceeding was conceived by the Committee and that Committee is responsible for the solicitation and the filing of the tenuous claims of the Interveners.

The paucity of the petition in bankruptcy is demonstrated by the allegations of acts of bankruptcy. These are a conveyance of certain land in Chillicothe, Missouri (8), which was an estate by the entirety (15, 19, 208) and which under the law of Missouri could not have been the subject of a fraudulent conveyance and hence an act of bankruptcy. *Stifels Union Brewery* v. *Saxy*, 273 Mo. 159. The other alleged act of bankruptcy was the payment of three thousand dollars to respondent's wife (8). This payment was made in pursuance to a property settlement and was for a present consideration (15, 19, 23, 24, 208). Respondent received deeds extinguishing his wife's interest in lands and personal property in Missouri and Texas and was relieved of further obligation to support his wife. By no stretch of imagination could such a transaction be determined a preference within the meaning of 60(a) of the Bankruptcy Act. There can be no preference where there is an adequate present consideration (*In re Pusey*, 37 Fed. Supp. 316, 323).

All these transactions were a matter of public record in Livingston County, Missouri, long prior to the filing of the petition in bankruptcy, and appellants are charged with knowledge thereof.

Subsequent to the filing of the petition in bankruptcy, the Committee attempted to give new life to the proceeding by alleging two additional acts in bankruptcy: One, the concealment of $55,000 which is couched in such indefinite language as to time, place and amount that it

does not rise to the dignity of a proper allegation of an act of bankruptcy; and the other of a payment of $80 to Owens. How a man who has assets aggregating $193,400 (27) could prefer a creditor by paying him eighty dollars does not appear.

The respondent has consistently denied the charges of fraud and acts of bankruptcy (11, 42). He has alleged his solvency. He alleges that he owes the Committee nothing. He recites a course of intimidation pursued by the Committee and an invitation to the Committee to test any claim it may have against him by a suit at law (44). His assets are in his own name (27).

This proceeding is clearly a perversion of the processes of bankruptcy to force a settlement.

CONCLUSION.

The writ of certiorari is only to be granted under exceptional circumstances, and certainly this is not a case to invoke the court's discretionary power. It is not a case of general or public interest; it is not a case in which any novel principles of law have been declared; it is not a case involving conflicts between different circuits; and it is not a case in which state law has been misapplied.

We respectfully submit that the petition for the writ of certiorari should be denied.

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